United States Court of Appeals

for the Second Circuit

APPELLEE'S SUPPLEMENTAL APPENDIX

77-7145

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77-7145

THE GUARDIANS ASSOCIATION, et al.,

Plaintiffs-Appellees,

-against-

CIVIL SERVICE COMMISSION OF THE CITY
OF NEW YORK, et al.,

Defendants-Appellants.

On Appeal From an Order of the
United States District Court
for the Southern District of New York

SUPPLEMENTAL APPENDIX OF PLAINTIFFS-APPELLEES

VOLUME II

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT INC., OSWALDO PEREZ and FELIX E. SANTOS,

Plaintiffs,

- against -

76 Civ. 1982

THE CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.,

Defendants.

----------x

New York, New York
March 21, 1977, 10:00 a.m.

Before:

HONORABLE ROBERT L. CARTER,

District Judge.

Appearances;

DAVIS, POLK & WARDWELL, ESQS.
Attorneys for Plaintiffs

BY: CHRISTOPHER CROWLEY, ESQ.
SARA E. STEINBOCK, ESQ.
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Of Counsel.

jqrp

Appearances (Cont'd):

W. BERNARD RICHLAND, ESQ.
Corporation Counsel of the
City of New York
Attorney for Defendants
BY: ROSEMARY CARROLL, ESQ.
Assistant Corporation Counsel

Alson Present:

PAUL BRENNAN
MURRAY A. GORDON, ESQ.

- - - -

THE COURT: I asked you here today because we are going to have to discuss the order that is going to be entered into this matter and also how to proceed.

I quite frankly think we all have to try to proceed in such a way as will be with little disruption as possible. I am, therefore, open to complete suggestions.

There is, as you know, another case that involves women police officers that has proceeded further than this and has to be considered, and I suspect that any order I am going to enter on this case, Judge Duffy and I will have to discuss it.

It doesn't make any sense for us to tell the Police Department for one thing and for him to tell them to do another thing.

I am open to complete suggestions as to how to proceed. As you probably do know, Judge Duffy had a Master who decided each individual woman's rights and managed to take each individual case. I don't know, it seems to me that makes sense as far as we are going to proceed if we are going to proceed that way.

I certainly don't propose to spend my time on that. That is one of the things we have to discuss. Obviously the city has to appeal and wants to appear and I want the city to appeal because, as a matter of fact,

we want to get the matter settled. With that opening, let's discuss it. I am glad to see the two of you back and I hope you have had a pleasant vacation.

MR. CROWLEY: Shall I lead off, your Honor?

THE COURT: Yes.

MR. CROWLEY: We have put two draft orders before the Court, one just passed up this morning suggesting how we would propose to go at this.

I think the basic suggestion in this order, which is addressed really just to the injunction and the rehiring issue and not the other issues which are still open could lead to a resolution that would not disrupt the March 31st rehiring date.

We have put two orders before your Honor.

THE COURT: I have them.

MR. CROWLEY: The one we gave you this morning, I am embarrassed to say, omitted the basic injunctive paragraph which is the same as the Paragraph One of Friday's order. We will obviously give you a composite draft. There is no injunction in our present order. Substantively today's order is the one we are suggesting is appropriate.

What it basically does is say that the city should review records which we have looked at ourselves

1 last summer and have some idea about to come up with
2 constructive seniority dates for each member of the class
3 and our proposal is that each member of the class shall
4 be given a date which is the median date for appointments
5 off of the first examination that he took, not the first
6 one that he passed.

7 The premise is that everybody here is quali-
8 fied to be a policeman and that therefore the appropriate
9 thing to look at is the first examination he took and to
10 give him a constructive date, a date at which half the
11 people who took the examination and were appointed were
12 appointed. It is a simple task comparatively.

13 The way we drafted the order we asked that
14 the city do that function. We think it would be expedited
15 if we could have our people participate in it. We have
16 some familiarity with it from Mrs. Steinbock's review last
17 August, I guess it was.

18 We would hope that members of the Guardians
19 and Hispanic Society could participate on a regular paid
20 basis for a change in reviewing those records, and we think
21 this kind of restructed list or list of class members
22 were the new constructive seniority date could be prepared
23 in a relatively few days. We did a rough list like that
24 in a period of three days last summer. We didn't have
25

full confidence because we didn't have full cooperation. We were merely given access.

We think that can be done in a short time.

The other thing we have proposed in here is that the Court directed the parties to confer on the remaining issues.

We think there are a number of them. We would like to offer our view that the Monel case does not necessarily bar back pay. We read that differently and would like to put our views on that before the Court at another time, but there are in addition to the back pay and front pay issue, there are a number of other seniority related matters that have to be gone into and we would also hope that the Court would direct that we confer about future examinations, affirmative action to make the class whole.

THE COURT: Let's take one thing at a time. I am not concerned about the back pay issue. All that does is to complicate matters and we are not focusing on what I want to focus on.

I want to focus now on the injunction order that is to be issued and what future steps have to be taken in order to effectuate my decision of a few days ago.

The rest of it I don't want to discuss. I am

not going to discuss that today.

MR. CROWLEY: I forgot one thing. I forgot to talk about the people not five foot seven inches. They present a different situation.

The people who got lower grades is just mechanical. For those people we recognize there has to be something in the nature of a hearing of the kind conducted in the Acha case. There are relatively few people in that class, we suspect.

We would propose to go ahead with the restructure of the class for the March 31st date and the people who are qualified as a result of these hearings, these hearings could be conducted at the same time or they could be slotted in whatever time the determination was made that they had been discriminated against.

Mr. Kimerling is closer to that issue.

MR. KIMERLING: If I might amend that Mr. Crowley said.

THE COURT: Let's take one thing at a time. Let's talk now about the people who took the examination.

I would like to have Ms. Carroll's reaction to that and then we will talk about those under 67 inches and then something else.

MS. CARROLL: I think the first thing we have to recognize is that the hiring on March 31st of 240 police

officers. Of that 240, 205 have been on staff at the Police Department, so we are talking about an addition of 35 persons.

We are also talking about a problem that involves the rights of 25 women in the Acha case, who have already been found to be entitled to relief and the existence also of 30 to 40 approximately more cases to be resolved in that action. And the fact that the city is going to appeal the case.

If the hirings proceed on the 31st -- and they will proceed on the 31st in any event, because the city will lose certain funding if we do not -- then the question becomes what is the last disruptive method of dealing with the situation.

From our point of view, since the option of an expedited appeal is available to us, we would urge that the Court sign our order. That allows the status quo to continue with recognition by everyone that the rights of the persons on staff are condition despite the Daily News headline, that the rights of those persons are clearly conditional, and that the circuit will give us a final decision on the question.

I am not opposed in any sense to proceeding with a method for determining the rights of the members

of the class expeditiously, but I think realistically we cannot do that by the 31st.

Additionally, we also have the double problem that we have part of plaintiffs' class being the problem is concerning the test takers. That could be resolved while the persons whose complaint -- and realize upon their claim of height being unresolved and those people have to be interfaced along with the Acha plaintiffs.

I don't see how we can do that without fairly severe disruption. Also, as I mentioned to the Court before, and I am having a meeting this afternoon on it, the city is interested in making appointments from the preferred list to the Fire Department and to the Corrections Department.

I think it is fairly clear that we need very much a decision from the circuit on the legal viability of that list.

THE COURT: The problem though is what you face is that you think you are going to get a decision from the circuit on the 31st?

MS. CARROLL: I don't think we can get a decsion by the 31st but I think we can get a decision fairly soon.

It would seem to me that cases of this kind

the hear pretty quickly and decide them.

THE COURT: My inclination is twofold.

I don't have too much of a problem, although I will certainly hear from Mr. Crowley about that, but I don't have too much of a problem with your order or your proposed order except that it does appear to me that we are going to be really in some total confusion at some point with these matters deferred. But I don't know how we are going to avoid that.

It does appear to me that what ought to be done, you are going to appeal it so what ought to be done is that Mr. Crowley's suggestion that the city, in the examinations, that's easy, to give some constructive seniority.

The city ought to be able to do that.

MS. CARROLL: During the hearing, your Honor, you had ruled at several occasions that the question of the propriety of various types of relief would be the subject of briefing and submissions following the decision.

From the discussion of the plaintiff, it would appear that the relief has already been determined. We don't see it that way.

I think that the defendant should be given an opportunity to present to the Court the problems

attendant to that kind of thing.

THE COURT: All Mr. Crowley is doing, Ms. Carroll, is making a suggestion for an order the same as you are.

MS. CARROLL: I understand that. But on the question of relief, we specifically reserved that question during the trial of the preliminary injunction to post-judgment.

At this point constructive seniority of the kind the plaintiffs are seeking, the defendants would oppose it. There are other alternatives.

Additionally, in terms of the seniority, I do not know what state the evidence is that the plaintiffs accumulated last July, I guess it was. I don't know how many persons are involved. That would enter into the question of what kind of disruptions we are talking about.

We are talking about 240 positions and then we are talking about further positions with the Fire Department and the Corrections Department.

I am not clear what position the plaintiffs would take on that. In terms of the 240 positions, plaintiffs' class originally, I believe, consisted of approximately 675.

THE COURT: Is it your view that what we ought

to do in terms of relief is that these people who are likely to be appointed on the 31st should sign waivers and that the matter should remain as is and no relief should be given and you shouldn't work on that at all until the matter has been resolved in the Court of Appeals?

MS. CARROLL: I think we should proceed on that. I am not saying we shouldn't. I think we should proceed with proposals of how we would deal with the questions of the plaintiffs who raise the height question.

THE COURT: I think that is different. My feeling about the height, I think that is, as Mr. Crowley said, the same as the women's issue.

It seems to me the Special Master that handled the women's question certainly ought to be the one who is familiar with it to solve this problem and handle this problem.

In terms of the test, it doesn't seem to me those things are required. Whatever way we do it, you are going to make suggestions, but we ought to do it that way.

MS. CARROLL: There are two aspects. The fact that has to be established is to whether or not an individual took an earlier example and failed it.

There is the other proposition that we have

to look at the P.A. 15 which is the application form they submit and we have to determine whether or not at the time they took that example they were qualified under various qualifications like age and things of that kind.

In fact, those are the same matters that are the subject of the hearing in Acha. The fact that a person took a test and failed it does not automatically establish that the person would in fact have been entitled to appointment.

If we are talking about a class of 675, then we have to get their exams and that is another question. How far back do we go on the exams? And we have to get their application to determine whether in fact they would have been qualified.

I think we should proceed with that but I think it is unrealistic to suppose that we can do this in 10 days.

MR. CROWLEY: Can I make a couple of apoints?

First of all, just overview. This case and the predecessor litigation have bone on since 1971. The relief we are asking for is a question of timing, when men will be appointed or not be appointed.

We think we have a proposal that could be put into effect in a week. If anything, it would sharpen

1 the issues before the Court of Appeals. We don't know
2 when there will be another hiring by the Police Department,
3 it could be a long time.
4 The people who are not hired at this time
5 will be getting the very discriminatory effect that we
6 are here to litigate and have been litigating about for
7 a long time.
8 We have a simple proposal that is the same
9 relief granted in Acha and the Chance case. We don't
10 think it is a controversial proposal and it could be
11 put into effect very promptly.
12 We think, frankly, the time has come to go
13 forward with some relief for people waiting a long time.
14 Mr. Kimerling is anxious to put a point in --
15 THE COURT: I will hear that later.
16 MR. KIMERLING: It is not a proper way to
17 distinguish them out. There are certain people in the
18 height people who fall right into the class of the
19 examination takers. They took examinations and were
20 disqualified and their dates are easily ascertainable.
21 There are others who fall into the class and
22 would have been taken but for the height requirement they
23 may require hearings but as to the first group and our
24 named plaintiff, Mr. Oswaldo Perez, certainly those
25

1 people are identifiable and constructive seniority could
2 be accorded them.
3 THE COURT: I am beginning to suspect what
4 Ms. Carroll says, it is going to be difficult in terms
5 of those people to settle anything without a hearing
6 because she is raising issues that there are certainly
7 going to be disputes about in regard not only with
8 respect to their taking an examination, but whether they
9 are eligible, and at the time --
10 MR. CROWLEY: They are mechanical questions,
11 though, your Honor. They are susceptible to review on
12 the record.
13 THE COURT: I understand that. But I have
14 difficulty in seeing how this matter is going to be
15 resolved by the 31st.
16 MR. CROWLEY: We have been through some of
17 these papers. Can we tell you what they look like?
18 THE COURT: Here is my problem -- well, you
19 can tell me. I am not granting the stay, that much is
20 clear. The stay is going to have to be granted upstairs.
21 What I am looking for is a way that we can
22 handle this matter without disruption. I think there
23 are going to be disputes about it. I think for example,
24 Ms. Carroll says that she wants to present her views
25

about the form of relief. I think she is entitled to do that.

MRS. STEINBOCK: I think as you said, your Honor, what we are suggesting here just is one form of relief.

If I can explain the mechanical elements of this? I, with one other person, went to the Police Department records this summer to try precisely to do this, to establish a constructive seniority date for our plaintiffs to determine if we could determine the first exam they took or if they failed.

I worked with the books in the Police Department for about four days with one or two other people. We did get some earlier dates. The records that we worked with at the time were not completely clear and as Mr. Crowley said, we had access but we did not have cooperation at the time.

I am told by Ken Gordon, one of the attorneys in the Acha case, that there are in fact cards for each person in the Police Department that give more accurate information.

We didn't have access to those cards at the time This could be easily accomplished by taking those cards or if necessary going back to the books that I

1 jqrp
2 went through, determining the first exam that a class
3 member took, what they got on the exam, whether it was
4 below the median or whatever, in any event establishing
5 the score they got on the first exam.
6 Ms. Carroll interjects the point of the
7 P.A. 15 and some people may not have been at the proper
8 age or whatever. That too is a mechanical task. You
9 pull out the P.A. 15.
10 For some people there may have been a problem
11 and for other people there wouldn't be a problem.
12 I suggest we go through this in the next
13 week and those people who have problems, and there are
14 disputes, may be put to one side and the people where there
15 are not problems that could be clearly determined that
16 they meet the requirements and be appointed on the 31st.
17 That would be one way to get relief for our
18 class members and still preserve the right for a hearing
19 on the disputed issues.
20 MR. CROWLEY: If I can add one word, it appears
21 some kinds of appointments will go forward on the 31st.
22 There may be some imprecision in terms of fairness at
23 the time but if we are going to err, let's err on the
24 side of the plaintiff.
25 There may be some people we have open questions

about but those people should be appointed now rather than another delay, the length of which we can't predict.

MS. CARROLL: I would like to say Mrs. Steinbock went to the Department of Personnel to look at the records. She never reviewed records of the Police Department and that is whay I was referring to when I talked about the P.A. 15.

I think the plaintiffs are talking about these people as though they were in fact cards and you can take some of the cars out and put some of the cards aside and then later on you interface the cards.

These are really people. These are people who should have a final disposition about their rights to the job clearly stated and to put in people as interim appointments and then take them back not only does it have a disruptive effect on the department and the morale of the department, but of the 205 people who are there.

The 35 new people it seems to me their status would be totally confused. They could be interfaced with any number of different groups.

THE COURT: What is the difference? What you are asking now is that two hundred some people be appointed with an understanding that their rights are going to be subject to whatever finally happens in this

case.

The difference between you is that the plaintiffs are asking for a procedure where members of their class would be given some consideration and priority with regards to possible appointment on the 31st of March.

MS. CARROLL: I understand that. Of the 240 appointments, 205 of those persons are just peoople being transferred on lines. They are not 205 new people. They are 205 people who have been there, the grant is expiring and there is a change.

Then there are 35 additional people who will be new people in the Police Department.

From our point of view, since we are going to have an appeal of this and since there will be a final decision, those people should remain, especially since there are so many factual issues that are involved with respect to the others.

THE COURT: Are you telling me now that there is no possibility that anyone presently in the Police Department who is on a permanent status, that if this decision holds, that his status will not be affected; is that what you are telling me?

MS. CARROLL: I don't understand the question, your Honor. Can you repeat it?

THE COURT: Are you saying to me that all the people who are presently in the Police Department, and now you say 205 are being transferred on line are permanent appointments, are you saying none of those people are going to be affected if this decision holds by the seniority issue?

MS. CARROLL: Of course they all will be. But I am saying in termss of continuity of service in the department, I would urge that we would keep those people there with the idea that we are going to as quickly as possible have a final disposition of the rights of all the persons involved and if in fact the Second Circuit upholds the district court's decision then we will have a final disposition of the problem.

In the interim, I think we should work on developing the rights of the persons who took the test in terms of all the factual issues that obtain regarding the date they took the test as well as the qualification.

Those are real factual issues.

THE COURT: What are you going to do about the women? You are presently under orders to appoint women.

MR. CROWLEY: Can I make a point?

THE COURT: I will hear you.

MR. BRENNAN: Those women whose rights have

already been determined by Judge Duffy will be appointed on March 31st and that amounts to 20, 25 on permanent lines because their rights have been established.

MS. CARROLL: That's not true either.

THE COURT: If that is so, then I am inclined to think that we are going -- well, I am moving away from defendants' position now.

I am inclined to think that we are going to have to find some way. If that is what you are going to do, the women are going to be appointed, other people are going to be appointed, it seems to me that I ought to be looking for some way where the members of this class will have some benefits from this decision by the 31st of March, as well.

MR. BRENNAN: These are women whose cases have been heard and have been determined by the Judge.

THE COURT: I understand that but I have to determine the rights of the members of this class.

The only thing that is in abeyance here is a question of determining their seniority and the specific form of relief.

That's all that waits.

MR. BRENNAN: The specific relief may require additional factfinding that may delay things quite a bit.

The Police Department is considering further hiring between now and probably monthly in the future but under different types of grants each of which arry their own specific qualifications which really don't depend solely on seniority.

They also include factors such as unemployment and city residency.

THE COURT: I think we are going to have to proceed with some expedition and some form of remedy and you are going to have to start thinking in terms of the possibility of having these people appointed by the 31st.

If the issue is as the plaintiffs have indicated it is, then there is no reason why something like that can't be done. I will hear from you and maybe give you a day or two if you want to responde or to offer an alternative but all you have said today -- and on Friday, I was inclined to accept the defendants' proposal but it appears to me that what you are doing now is proceeding to appoint everybody but members of the class who have been defined in this case. they are being put aside until you can settle other matters.

I don't know, it could take a year or so under those circumstances.

MR. CROWLEY: And there would be further appeals.

THE COURT: You can go to the Supreme Court of the United States.

MR. BRENNAN: There are at least 2,200 people on the preferred list who have not been retired.

There are only 600 or so that have been processed so far for rehiring.

THE COURT: But the point of the decision is that the brunt of the layoffs that have occurred in regard to them on the basis of seniority have been borne by blacks and Puerto Ricans and it does not appear to me, as far as I know, that they are the ones who are going to be rehired.

Now, you are indicating that these other people ought to be rehired. I think particularly if the women are involved in this, they are suttling in and out with regard to the matter.

I was not in favor of the order that the plaintiffs presented to me on Friday and I had some question about what was proposed today, but I am now convinced you are not helping me at all.

You and Ms. Carroll are for status quo and you aren't making any adjustments at all about this. There is going to be disruption and so forth but you are going to go ahead and appoint people and it does seem to

me that you ought to make some effort to handle this matter in regard to some members of this class benefiting by some appointments on the 31st.

MR. BRENNAN: What I would like to suggest is from the appointments we have made to date that the minority representation in those appointments approximates 30 per cent which is greater than the number of minority members on the previous lists so that I don't think the delay is really detrimental to a very significant member of the class group.

We have to remember that --

THE COURT: Mr. Crowley, sit down. Everybody is going to be heard. That is if Mr. Brennan doesn't talk very much.

MR. BRENNAN: The list is comprised of 11 different examinations and 11 different lists which are all interfaced together, and we would have to take each list separately and determine a seniority list for each list and then combine them together.

So the relative seniority really comes down to some finer points.

THE COURT: I don't really think in all fairness that I can now quite frankly accept the matter and let the matter slide.

I think that what you and Ms. Carroll are

1 going to do, if this is a proposal not for relief or
2 it it is not an appropriate one and you find that it is
3 not one you can live with, then I think you have to
4 present some counter-proporal but you are going to have
5 to move from the position that you have taken, that we
6 do nothing until you have completed your appeals.
7 I am not prepared to accept that.
8 MR. BRENNAN: That was not our position at
9 all. We should take the time to devise an appropriate
10 method of relief --
11 THE COURT: What do you suggest?
12 MR. BRENNAN: That we take the time to study
13 the examinations and the effect that the restructuring
14 would have on the class and the rehirings and it probably
15 means that it may take maybe 30 days longer than the
16 suggestion by the plaintiff.
17 To do everybody in the next two weeks would
18 probably result in a great disruption and a great con-
19 fusion and probably not an accurate picture of what really
20 should take place.
21 I think just in the interest of doing it
22 right, we should take a little more time.
23 In addition, that 30 per cent minority re-
24 hiring in the people we have rehired to date may be dis-
25 rupted.

THE COURT: If your appointments aren't made on the 31st, you lost money, is that right?

MR. BRENNAN: There could be a big domino affect here. The receipt of hiring were rehired last Friday are all conditional hirings and they are all based on conditional structure. If we have to lay off 205 people --

THE COURT: I will tell you what I think I ought to do.

MR. BRENNAN: We haven't even discussed the proposal in this order with the Police Commissioner or the Department of Personnel to see if it can be effectuated.

THE COURT: I am going to suggest that you talk to the Commissioner and then I think that you and Mr. Crowley and Mrs. Steinbock and Mr. Kimerling and Ms. Carroll, and I understand the women are involved in it, I think that all of you ought to confer and see if you can't come up with some sensible approach to the problem to present to me and to present to Judge Duffy.

I think that is the best I can do.

You talk to the Commissioner because you have to do something about it and then confer and maybe I will give you two days and we will have another meeting on the 23rd to see if you can work something out.

Mr. Gordon is in the back of the room now and it appears to me that if we did it that way we might reach some kind of solution that everybody could live with and if you can't reach a solution where everybody can live with, at least you will be presenting me with some proposals which I would therefore be able to select.

That is my solution. I don't know enough about it to make a ruling from the bench. I want you, Mr. Brennan and Ms. Carroll, to confer with the Police Commissioner and before you leave, I want Mr. Gordon and Mr. Crowley and you to set a time in which all of you will confer about how you are going to proceed with this matter.

I don't think you can make any proposals until after you have talked to the Commissioner and that is why I suggest you do that.

Mr. Gordon has an interest in it because I can't issue an order that is going to bar his people or have his people barred from this

Let's say we meet 10:00 o'clock on Wednesday.

MR. GORDON: I would like to request that it beby tomorrow. In our proceeding we require an order by the 22nd in order to be able to have the rehiring effectuated by the 23rd and I know that Judge Duffy is very anxious

to accommodate his order to whatever your Honor decides here.

THE COURT: What is the 23rd?

MR. GORDON: We have a stipulation with the city which requires that an order be executed by the 22nd as a condition for hiring by the 31st.

THE COURT: I think, Ms. Carroll, you take that up with the Commissioner and we will have to meet tomorrow. If not, if you can agree that that is not going to be put into effect, we will meet at 10:00 o'clock on Wednesday.

If the city waives that then you have a little more time. I think it is more sensible to take a little more time on it to thrash it out because I think you are going to have a lot to talk about.

But whatever we are going to do, we will either meet tomorrow or we will meet on Wednesday if the city agrees to waive this requirement as far as you are concerned.

Is that satisfactory?

MR. GORDON: It is, your Honor.

May I point one thing out to your Honor? We do not view our position as being competitive with the plaintiffs in this class action and from our point of

view obviously whatever can be done between now and the 31st to determine the relative revised seniority dates, we will cooperate and we believe the revised seniority dates should be followed.

I would tell you one other observation, because we have had considerable occasion to deal with the records here.

Given the nature of the class in this action, it would be our judgment that the kind of data that the plaintiffs wish to develop here -- and I am talking now in terms of those who took the prior examinations -- we would have very little doubt that the mechanical data could be developed here before the 31st.

THE COURT: I still think the best way is for you to confer and see if you can reach an agreement and if you can reach an agreement on how to proceed, then present it. If you can't reach an agreement, then I may be conferring within 24 or 48 hours on what I have to do. Maybe I have to make a choice. I hope not. I hope you can agree on something.

Thank you very much.

You will let me know and let Mr. Crowley know and Mr. Gordon know whether we are going to meet tomorrow or what.

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3/23 t[redacted] after

Q:mg 1

THE COURT: Ms.Carroll apparently is having some problem but I thought maybe I could find out what happened as to whether or not there is an agreement.

I gather there is not an agreement.

Since my information is that she was bringing over some affidavit -- what occurred? Did you meet?

MR. CROWLEY: We met immediately after our session adjourned for one hour, I would say. We asked the City a lot of questions about procedural difficulties if any and what their position was on alternate approaches.

Basically the City's counsel took the position that they had to get back to the Commissioner before they could get to the substance. They did not discuss any alternate approaches, as far as I can recall.

After that session we learned by telephone to Mrs. Steinbock that they had met with the Commissioner and that he basically did not agree to the median appointment date approach and I think there was no other suggestion.

MRS. STEINBOCK: I think also at that time they did indicate they disagreed with the median appointment date but stressed that they wanted to take a much longer time than would be necessary before the 31st to work out the earliest appointment dates, any appointment dates.

Lt. Brennan had been working with some of these

Q:mg 2

files although I am not sure exactly how comprehensive,but he did say he thought there would be problems with compiling this information and they just were not going to do it by the 31st.

On Monday I sent to Ms. Carroll a copy of the information --

THE COURT: You mean the only time that you really sat face to face and met was one hour after you left here? You really have not conferred other than by telephone since then?

MRS. STEINBOCK: That is right, your Honor. If I can explain what happened --

THE COURT: What I really was hoping you would do, I had asked for you and Mr. Gordon and Ms. Carroll to meet and I thought that was essential face to face and see if something could be worked out.

MRS. STEINBOCK: Mr. Gordon was with us at this meeting that we had here. We raised all of their proposals and asked for counterproposals. They left it that they had to bring this up to the Commissioner.

On that day, if I can just explain a little more, I sent Ms. Carroll the data which we compiled over the summer to use as a starting point. I can show this to your Honor. It is not complete at all because they did

Q:mg 3

not give us the information we needed.

I gave this to her to use as a starting point. She was supposed to get back to me. She did not on that day.

Yesterday morning I called and I had difficult problems reaching them. They had not yet spoken to the Commissioner who was apparently out of town.

After basically calling all day, finally at six o'clock I reached Mr. Brennan. I spoke to him intermittently to find out what was their final answer on this and he said that the information was too difficult, they were not going to provide anything by the 31st and they would take it up.

I asked at that time-- that is, take it up to the Second Circuit.

MRS. STEINBOCK: I asked if we could meet last night or early this morning and asked them to call back on that and they never have. I think we met right after the session with your Honor because all the parties were here and we thought that would be the first meeting.

THE COURT: I don't object to the first meeting. I am surprised that you did not have any future meetings.

MRS. STEINBOCK: There was nothing we could do.

MR. CROWLEY: I don't know how we can go forward.

Q:mg 4

One of the things we want to raise is that we think the City's position on the delay and the need for more delay is ingenuous.

We have a proposal on how this can be done in one day's time with a little help and cooperation on their part. We can go into that, if you like, or we can abide their arrival.

THE COURT: Well, you have discussed these things with Ms. Carroll?

MR. CROWLEY: We made the same proposal to her, sir.

THE COURT: To what extent have you discussed these matters with Mr. Gordon? I don't want anything that I decide in this instance to be in conflict with what is to be expected there.

MR. CROWLEY: We have met with Mr. Gordon. He is here and can speak to the matter himself.

Our estimate that this could be done in one day is based on Mr. Gordon's broad experience with these documents which say it can be done.

We have a proposal that we think can get all the people appointed. Our problem is time is passing and basically the City is dug in, if I may say so.

THE COURT: I understand that and I gather that

Q:mg 5

is where we are.

MR. CROWLEY: If I may say so, one approach to this thing, we think it is perfectly clear this can be done if they cooperate. What could be done as an alternative is to say we shall have appointments on the 31st but we will have a quota based on the number roughly of minorities on those lists which is a little more than a third and if you can't do it in the more comprehensive way that we suggest, then let us have rougher justice by having a quota appointment with the appointments on the 31st.

We are terribly reluctant to get the dates go by and let them off the hook.

THE COURT: I sort of reached that conclusion, too. I was not going to do it but it seems to me that if the city is not going to cooperate, Ms. Carroll and Mr. Brennan are going to be resistant and not cooperative, there just is no point in letting the date go by because I got the impression on Monday, or at our last hearing, that they just did not want to take the steps that are required until they finally felt they were required to, which is after all the appeals had been exhausted.

I will hear it. Even Mr. Brennan and Ms. Carroll could have been here by this time. I will hear you.

Q:mg 6

MR. CROWLEY: We would submit, your Honor, that a comprehensive list of the roughly 500 people in the Class B made up showing the first exam they took and their score on the first exam that they passed.

We think that should also show the military credits which are in a computer and easy to come up with.

There should be sublists, and this can be done easily by Friday. The sublists should list those persons who took exams pre 7046.

We take the position the exams clearly covered in the situations are the ones which start with 7046 and go through 0014 and that is from February 1968 down through 1970.

That is a position the other side does not agree with.

There should be a sublist of people who took and failed exams prior to 7046.

There should be a sublist of people as to whom there are questions on qualifications, that is to say, a question which they raise, the City raises, on whether they had a driver's license, a high school diploma, or the right age, or were on probationary status or other problems such as citizenship.

That list we think could be done readily by

Friday and we think they should have the burden of raising the problems about the persons that they challenged.

We think appointments can be made on the basis of that list on the 31st. It is going to take some overtime work and so on after that, but I am sure it can be done if they put their back into it and we are willing to provide people from our office and from Mr. Gordon's office who are familiar with this.

We think that list can be prepared in good faith in a day.

We hope to have a hearing on Friday as to how to make appointments then.

MS. CARROLL: I apologize, your Honor, for the delay in getting here but we had to get approval for an affidavit and the Police Commissioner is not in town, he is in California.

I have an affidavit which I would like to hand up to the Court now. It is from the First Deputy Commissioner of the Police Department, James Taylor. It is submitted in support of the defendant's order and it outlines the basis for the position.

I will wait until you have read it to make my comments.

THE COURT: The problem, Ms. Carroll, that I have

Q:mg 8

with this is that this is not what I had hoped we would reach. I had hoped the conference with the three parties in interest in this matter,that we would reach a solution which would be satisfactory all around.

It does not appear to me that you have moved or the Police Department has not moved from its original position.

MS. CARROLL: We spent the last two days, Lt. Brennan and I, going over the records and we are convinced that the correct reordering could not be done in ten days. We are willing to work out a schedule with the plaintiffs regarding doing that.

THE COURT: I had hoped that you would have gone over this. What I really wanted you to do, and I gather it has not been done, but I wanted the two groups or four, I suppose, to sit down and discuss this matter and not for you and Mr. Brennan to be operating alone.

I thought that by some kind of discusson, raising your problems and the plaintiffs' problems, that you as reasonable people could arrive at something that could be salable.

MS. CARROLL: We did have the discussion. We went back and looked over the exams that the plaintiffs had agreed with us would be a preliminary starting point. That

Q:mg 9

was 7065 and one other exam. when we went through that record of exams at the Department of Personnel,our preliminary investigation indicated that there was only one person from the preferred list from 7065 who would fit the class.

We have to go back to the Police Department to further find that as to his PA15.

A preliminary review indicated that he did not have his driver's license on the date in question and from our point of view, he would not have been qualified.

I think most importantly, the Second Circuit came down with a decision yesterday in Equal Employment Opportunity Commission v. Local 14 --

THE COURT: It has nothing to do with this.

MS. CARROLL: It does --

THE COURT: It has nothing to do with this matter because what I gather has happened, Ms. Carroll, is that that decision has apparently hardened your position.

MS. CARROLL: It has not hardened our position. We went through the 7065 list and we found one person who was tentatively qualified. We feel that since 26% of the persons who have been hired are minority persons, we would also have to check their prospective seniority again as against the new list from 7065, that is, from the preferred

list of persons not hired to determine whether or not any of the plaintiffs' group, that is, of the top 617 on the preferred list, would replace these persons.

We can't do it in ten days. There are too many people involved. We have started on it and I believe we can work out a timetable to pursue that, but at this point, we cannot do it in ten days and I believe that the affidavit from the Deputy Commissioner indicates the reasons why.

THE COURT: What is your timetable?

MS. CARROLL: I think that we can probably do it in 30 days. We could have complete computations of the 617 on the preferred list as well as the relative seniority of the 26% who are minority, who are on staff, to determine whether or not they have taken earlier exams and would have been qualified earlier even than the 617 on the preferred list.

THE COURT: Mr. Crowley, I will hear your proposal.

MR. CROWLEY: Our basic position is that the 30-day -- there is no need for that kind of time delay. From what we know about the records, you can put together this comprehensive list in one day. We are prepared to sit down with people who are familiar with the documents

Q:mg 11

and come up with the appropriate list.

I should perhaps mention that we learned the other day in one of these conversations that there are going to probably be appointments of another 40 policemen on April 1st so that the ante is in a sense going up.

MS. CARROLL: That is part of the 250 that you have already been notified of. They had a staggered appointment date.

MR. CROWLEY: If we had the access that we asked for in October this would be ready now. If we can have access now and the use of police personnel, we can have the list for you on Friday.

THE COURT: What is your alternative?

MR. CROWLEY: My alternative, basically I have to take the position which I am afraid is the case, the City is raising these difficulties that are not substantial and the only way to go forward is to say: All right, if they cannot come up with that list, we have to structure this list in some way, let us take a ratio or quota -- there are slightly more than one-third minority on the list, and if the City cannot come up with a refined list with our cooperation in time, let's go forward with appointments on a quota basis so that we don't have another round of men being appointed or recalled on the basis of these

Q:mg 12

discriminatory exams.

THE COURT: Mr. Gordon, I would appreciate it if you would give me some suggestions. You have dealt with this problem, I think, and I would appreciate any observations you might make.

MR. GORDON: I think I am first obliged to make observations in terms of the interest of the women we represent in the other proceeding and I do want to apprise your Honor of the following:

No matter what disposition is made of the problems that exist here, there is no reason, so far as we can tell, why the order of Judge Duffy, which must be signed today, cannot go forward and provide for the re-hiring of the women involved, and I shall tell you why.

The latest seniority date of any of those women will be February 1970. That means that they have earlier seniority dates than any of the 205 who are presently working or any of the other persons who would be placed back in this position other than those who will generate out of this proceeding.

So that we think in the first instance there is no prospect, no likelihood whatsoever, that any disposition here would in the end result in any of these women not being appointed or being taken down after they have been

appointed. Therefore we think our order can go forward.

Secondly, our best judgment from the familiarity we have with the records, I must say, disagrees with the City and does agree with the plaintiffs.

It is our judgment that the inquiry that need be made with respect to the number of exams in which you are interested, we have really no doubt that that job could be done within two days, within one to two days. And we are willing to make-- well, we will have to get some sort of adjournments in our own hearings. We are going with those hearings virtually every day.

We will adjourn our hearings and I will make part of our staff available who are familiar with the materails to assist in expediting this.

I do believe that your Honor could handle this problem on a piecemeal basis, if I may suggest it. Let us see whether this job cannot in fact be done by Friday. If the City will make its records available, we will make staff available, the plaintiff will make staff available, and let us see whether the job cannot be done between now and the end of the day Friday.

If not, then your Honor will have to confront the precise other forms of relief that you may have to deal with on the contingency that the data cannot be developed

Q:mg 14

by Friday.

I do not think your Honor need go beyond that at this point. I think what has to be tested out is the correctness of the perceptions of the City and of the plaintiffs whether in fact the investigation can be conducted between now and Friday.

We are willing to be of whatever assistance we can based upon our familiarity with some of these records.

MS. CARROLL: I would make two points with respect to Mr. Gordon's comments. It is specifically that approach of piecemeal solutions to this problem that the affidavit of the Commissioner addresses itself to. We do not want to hire, fire and rehire these people needlessly.

The second point--

THE COURT: You have not heard him. He says the piecemeal approach of the problem from my point of view -- what I should do is see whether or not contrary to the Police Commissioner, that with the help that he is offering and plaintiffs and so forth, whether a list can be drawn up by Friday.

If it can't be drawn up, that is practical, and we find that it can't be drawn up, then his suggestion is that I will then have to do something else. The only suggestion is a pragmatic one, to see whether or not it can

Q:mg 15

be done.

MS. CARROLL: The other comment I wish to make is that in Mr. Gordon's case, they have been having hearings since September 1976 and the hearings address themselves to the City's contingents and the drawing up of the list is only half the case. The City has a right to put in its position with respect to the satisafaction of requirements.

THE COURT: Ms. Carroll, what Mr. Gordon is suggesting, it seems to me, is something that I hardly think that if you listen to it you would object to.

MS. CARROLL: I just don't see it is feasible from what we did in the last two days.

THE COURT: If it is not feasible, then at least the plaintiffs and you and he will know it is not feasible and I will know it is not feasible and everybody will agree it is not feasible, and at that point we will be faced with the deciding of an alternative being presented.

At this point the plaintiffs and Mr. Gordon say it is feasible and you say it is not. All Mr. Gordon is suggesting is to see whether or not he and the plaintiffs are correct or you are correct in the next two days.

MS. CARROLL: His contention is that it may be feasible to develop a list based on the terms that the

Q:mg 16

Department of Personnel has. That is only half the problem.

The otherhalf of the problem is getting the records from the Police Department with respect to these persons to determine their eligibility at that time, and then cross-checking that against the records of the persons who are on staff, which means we have to go back to the Department of Personnel for the 26%, check whether they took other exams and check on the PA15s or those persons to determine whether or not they are eligible.

The project involves, I would say, approximately 800 persons.

THE COURT: It is my impression that Mr. Gordon is suggesting the whole project that you are talking about--to see whether that can be done within the next two days, that is his suggestion.

MR. CROWLEY: If we are going to go ahead with the proposal, which I hope we are, we would need direction that perhaps six or eight police officers with some familiarity in this area be assigned to help us with this thing and it ought to start this afternoon, if possible.

There are people who are familiar with these records.

MS. CARROLL: There may be persons at the Department

of Personnel who can assist. There will not be uniformed police officers culling names from lists. We will make every effort to get persons from the Department of Personnel but we would object because the list that counsel is talking about is an imprecise and incomplete list. It is just a reference to the records of the Department of Personnel for purposes of the 617.

It does not answer the question of the relative rights of the persons presently on the staff as to their seniority.

THE COURT: I thought the people presently on the staff, that their seniority had been determined.

MS. CARROLL: It may well be that some of the plaintiffs in the top 617, when we go through the research, may come up with a seniority date that predates people on staff.

THE COURT: The only people involved in that, as I understand, would be blacks and Hispanics. You don't have the whole staff, do you? The issue of their seniority other than those people on the police force, their seniority has been determined. There is no issue with regard to them. It is clear.

MS. CARROLL: There are plaintiffs in this case -- at the beginning of the litigation clearly if we establish,

for example, that a particular person on the preferred list has a seniority date earlier than a person, no matter what their ethnicity, that person will bump the person.

THE COURT: I understand that.

MS. CARROLL: We have to determine whether that person to be bumped can establish an earlier date.

THE COURT: I can't see that other than that the person to be bumped is a black or Hispanic.

MS. CARROLL: 26% of the people hired are black and Hispanic.

THE COURT: The point is that insofar as they are concerned, that is 26%. You have a small group. You talk to me as if you have the whole department.

MS. CARROLL: The plaintiffs are urging only a 33% quota. The difference between what the plaintiffs want and the situation at hand is very small.

THE COURT: I understand that entirely. I think if the matter can be resolved, it ought to be resolved. If it can't be resolved, I will have to follow either one of the other suggestions. You will either have to go ahead and stretch out getting the list for a longer period of time and make your hirings on the basis of the 26% or 30% or something like that, but I think the plaintiffs are right. I think that if it can be done, it ought to be

done and I think it could be easier if it can be done before the 31st, but if it can't, obviously it can't be done.

The only point is that what I am finding that I don't particularly like is that there does not appear to be any disposition to even make the attempt to see if it can be done. That is my problem.

MS. CARROLL: We spent two days doing this. We went through the list of 7065 which is a long list of persons who took the exam.

THE COURT: You have done part of it already.

MS. CARROLL: And our research indicates there is one person arguably who can be within the group. Beyond that I think the proposition that we are reordering hiring datesonly for minorities but not for other persons who took the exam, that is a fairly substantial conclusion that it seems to me, in view of the law in this circuit, should be determined before you start creating lists and changing employments for various people.

THE COURT: I don't believe that the law in the circuit is that strange. You have done that in regard to women. The law in the circuit in regard to women, that appears to be what the law is.

MS. CARROLL: The women did not take tests. There

wasn't a question that they took previous tests. The case was clear. The women had never taken any tests. They did not have rights vis-a-vis other people who took exams.

The plaintiffs in this case are in a different position. If the examinations are void, examinations seven years old, are we to reorder the seniority changed just for minorities? That is a fairly substantial legal question and the decision of the Equal Employment Opportunity Commission handed down yesterday says at least there should be a hearing on that question.

THE COURT: As I understand the decision yesterday, we are talking about the relief, not the merits. You are arguing the decision --

MS. CARROLL: This is the relief.

THE COURT: You are rearguing the merits of the decision I made. Obviously I may be wrong and obviously the Second Circuit may reverse and obviously you are going to appeal it and I wish you well.

But the point is that that is not the issue we are discussing here.

MR. GORDON: I may say, your Honor, what could happen between now and an arbitrary date of Friday that I have talked about, would at least define the issues for your Honor. In other words, if what your Honor wants to do

Q:mg 21

is deal with the seniority dates of those persons already on staff and not just with those who are about to be rehired and determine their position on a preferred list reinstatement, at least we will isolate that question for you.

If there are some cases in which qualifications are in doubt, they will be focused on and you will have the data on which to make the decision.

I do not believe it would be plausible, between now and Friday, to revise the entire seniority structure of all those already in the job to determine what their relative rights are.

It is quite clear if that is what the City is talking about, it will be a lot more than 30 days to do. But if the only inquiry you have is the revised seniority dates of those on the preferred list for reappointments and have the reappointments predicated on their relative positions on that list,that job can be done in the foreseeable future.

THE COURT: If there is any difficult problem I have to face, you will have to define it. I thought that is what the problem was in this case. I thought that the issue was not the people who have remained on staff but the people who have been fired,and who have been fired,

according to my analysis of the law, because of the fact, in terms of tests that weighted heavily against them.

Those are the only people I thought are involved. The issue is whether or not those people have rights superior to the people on the staff based on the department's seniority.

I don't understand how anybody who has not been fied and had seniority except as I have indicated, unless he is black or Puerto Rican, who may be able to bump somebody who is already on the staff based on seniority, I don't understand how anybody else is involved.

But, in any event, I think that I will accept the proposal that has been made by the plaintiff and supplemented by Mr. Gordon.

I agree with you, Mr. Gordon. I think, and I will advise Judge Duffy and you may, of course, do so, that I don't right now see any reason why what is happening here should in any way affect the order that he is going to tender.

Secondly, I would suggest and I am going to order that the effort be made to secure the order of the persons on the preferred list among the class of the plaintiffs with the cooperation, and Mr. Gordon has offered cooperation, and I am going to accept that, if the City

will accept his help and the plaintiffs' help, and, of course, the City's cooperation, to see whether or not we can have that list presented to me -- well, if you are going to work today, I think you are going to have to work through Friday.

MR. CROWLEY: We hope to be done by Friday so we can have a session any time you pick on Friday. We thought about Monday but I don't think we need that long.

THE COURT: The latest I can have any session on Friday is going to be rough, about three o'clock, and that seems tome it will cut it pretty close.

MR. CROWLEY: Monday morning?

THE COURT: All right, let's do it Monday morning.

MR. CROWLEY: Can I make a couple of points, your Honor?

THE COURT: Let me finish. If the parties come in to me at ten o'clock, Monday, and indicate to me that it is impossible to get a list and to accomplish this task in an orderly fashion by the 31st, then I would want alternative proposals or an alternative proposal presented as to what order should be entered.

But at least we will make the effort to do it by Friday or within the next two days and report to me on Monday morning.

Q:mg 24

MR. CROWLEY: Unfortunately, we are dealing in a fairly hostile atmosphere. We are talking about co-operation and we can use strict guidelines if we can get them.

We would hope your order could direct that counsel for plaintiff and Mr. Gordon and his colleagues be given access, direct access, to the records involved, that we have that access until, let's say, ten o'clock at night, and that we have access over the weekend.

We also hope that your Honor would direct that sufficient staff be given from the defendant's side, say a half dozen people with clerical abilities to participate in the exercise.

THE COURT: Well, I am willing to do anything like that. In terms of that, if you and Ms. Carroll and Mr. Gordon can work it out, I would prefer that, but if not, I do and am requesting that the City cooperate. Failure to cooperate means that it has no intention of attempting to accomplish this and I hope that is not true.

But I am asking the City to cooperate and if you feel that it is necessary to make that precise in an order, then I will issue an order in whatever terms you feel necessary.

I think that probably the better thing to do

Q:mg 25

would be for me to give the three of you about ten minutes to talk and if you find that you are going to be able to accomplish what I think I made clear that I wanted accomplished, then I will issue no further order.

If not, then at whatever suggestion is made in regard to the terms of the order, I will do it.

It seems to me it would be better if you could work it out without hostility. There is no purpose about being hostile. I am either right or wrong and the Court of Appeals is going to do it one way or the other, so it ought to be worked out. That is all.

I will give you about ten minutes to see if you reach a point of whether you feel that the atmosphere is such that nothing further is needed.

If an order is needed, then I will dictate one into the record.

(Recess)

MRS. STEINBOCK: Your Honor, if I may, I think all parties have agreed to the procedure we will follow and if I can just outline it for you --

We will begin at 3:30 this afternoon. This is the first time that Ken Gordon can be available. We will provide at least two people, the Department of Personnel will, if possible, provide two people. At that time, we

Q:mg 26

will begin looking at the list that we have already culled which gives us some information and we will look for the exam that a person failed, if they failed a prior exam, we will find that out. We will find out the exam that they passed, the score on the exam, and the appointment date on the exam.

The Department data has the information as to the median date of the exam. With that data we will have the data we need.

Again Mr. Gordon does think we can have this quite easily.

THE COURT: You are going to start this afternoon at 3:00 o'clock?

MRS. STEINBOCK: Yes. We have discussed the possibility of working tonight and leaving the department open but we feel we don't have to do that tonight.

THE COURT: I thought Mr. Gordon would be of help.

MRS. STEINBOCK: He will be. That is why we are waiting until 3:30.

Given that fact, I don't know if your Honor would prefer to have the hearing at 3:00 if we have the data by that time, just because if alternate proposals are considered, it may give all parties more time.

Q:mg 27

THE COURT: I think what we can do with regard to that, I don't have anything scheduled. I will have to leave roughly about 4:00 or 4:15 but if youreach a point where you think you can have the hearing with everybody having sufficient notice, get in touch with my chambers, the Court Clerk, and I can possibly arrange it.

MRS. STEINBOCK: We can apprise your Honor Friday morning as to the status of our work.

THE COURT: You get in touch and if it is convenient for everybody to do it on Friday, fine. Frankly, I don't see where it makes any difference but I will be available.

MRS. STEINBOCK: Thank you, your Honor.

MS. CARROLL: The defendants would like a ruling on one point. From our point of view the earliest exam litigated in this action was the examination 7065 which was an exam in which evidence and testimony was had.

The plaintiffs would wish to pursue exams earlier than that, specifically an exam 7046. We believe that that, because the Rand Study and all the evidence was limited to the 7065 as the earliest exam, that that should be the earliest list that the inquiry starts with.

THE COURT: What were the exams in question?

MS. CARROLL: 7065 through 0013 was the subject

of the Court's inquiry and of the Rand Report. That is the exam that you received statistical data on.

The plaintiffs want to examine the list for earlier exams and specifically 7046.

We would request a ruling on that. From our point of view that exam was not in litigation at all in this case and it should not be the subject of this.

MRS. STEINBOCK: Your Honor, may I be heard?

What we are talking about here is compiling data on one additional exam. That is all I believe in issue, 7046 as opposed to 7065 going forward. Plaintiffs clearly put in evidence Plaintiffs' Exhibit 17, a Department of Personnel survey on Exam 7046 which lists the disparate impact. That is in evidence and it is in our brief.

I think there are two points--

THE COURT: What reference?

MRS. STEINBOCK: Page 20.

THE COURT: What is the reference in the opinion?

MRS. STEINBOCK: Your Honor does not specifically list the exams in the opinion. Your Honor refers to the Rand Report in the opinion. We had other exams, specifically 7046 in evidence and the statistical disparate impact were presented in evidence in the case.

In any event, I would say this may be an open

Q:mg 29

question, your Honor. I would say that while we have these resources we are going through this and we should compile the data on 7046 which is a small amount of time, and if your Honor at some point rules that that is not in fact in the case, we will have some extra data.

If we are going through this now, and we believe it is clearly in the case, judging from all the evidence, we will have that data.

I thought frankly Ms. Carroll and I had agreed that we would compile the data on 7046 so it would make sense if it was within the ruling.

I don't see in terms of extra burden of time -- it may take one or two hours, while we are doing it . We would like to do a comprehensive study.

THE COURT: I think it can be settled now. The Rand Study involved-- which was the study on which I relied as evidencing who should be taking the examinations and disproportionate impact-- what studies were involved in Rand?

MRS. STEINBOCK: Rand specifically dealt with Examinations 8046 and 0013. In that report, however, Rand referred to the other exams at the time. They do not have specifically the statistical data except for two exams.

One of our points was that the Rand itself, and

I believe we have that in evidence and in our brief, indicated that there is no evidence but that the other exams given at that time had the same impact.

THE COURT: I don't have the opinion down here. I will have to go upstairs and look at it. I didn't know I was going to be faced with this question. I thought it was very clear in terms of the number of examples we were dealing with and I don't recall whether there was any discussion of 7046 or not.

I remember some 00 something in the course of the hearing and so forth but I don't recall that.

MRS. STEINBOCK: In this inquiry I would ask that you look at Plaintiffs' Exhibit 17 and we brief it beginning at page 20.

MS. CARROLL: It is our position that we would be predisposed to be bound by the recitation of the Rand Studies in the exams that it felt could be extrapolated to by virtue of the study and if 7046 is not in there, then 7046 was not. I think that is fairly easy to do.

THE COURT: I think that is fair. That is what I certainly was basing it on. I spent the latter part of the decision indicating that the study was valid in terms of its approach and, therefore, it seems to me that is the only thing I could rely on, the Rand Study.

Q:mg 31

MRS. STEINBOCK: I would say there is no evidence that Rand did not include 7046.

THE COURT: All I am saying is that Ms. Carroll has the right, and you and all of us can see what studies they specifically referred to -- if they did not mention or refer specifically to 7046, then I can't base any opinion upon it because I am relying on that decision or on that study.

MRS. STEINBOCK: Can I ask that we can possibly have your Honor's answer perhaps by this afternoon on this specific point because these people would be clearly in this group to be hired.

THE COURT: You can have it. As a matter of fact, you can look at the study yourself and get it. You don't have to wait for me.

MRS. STEINBOCK: We may reach different conclusions.

...

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., et al.

v. 76 Civ. 1982

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.

March 28, 1977
10:00 a.m.

(Resumed)

(In open court)

THE COURT: Good morning. I hope this is going to be a pleasant morning, a pleasant and final morning, I hope.

There is an order to show cause for a stay.

MS. CARROLL: Your Honor, that is our motion.

We make that motion based on the recent decision of the Second Circuit as indicated in the affidavit and the memorandum.

We would like formal argument on the motion to reargue prior to the end of this week, so that it is definitively clear for the Second Circuit that the question was raised in this case and we believe definitively disposed of in favor of the defendants' position here, was in fact reviewed by this Court prior to an appeal.

THE COURT: Miss Carroll, I won't argue about the matter. I certainly will hear it.

I am disposed now to finalize what I am going to do today. I don't see any purpose to be served in drawing this out any longer.

I will hear your argument, I will hear the plaintiffs, and we will get this over with, it seems to me, today, and move it out of this court to the Court of Appeals.

MS. CARROLL: Your Honor, do you want argument on that now?

MR. CROWLEY: Mr. Kimerling can respond. We just looked at these papers when we walked in. He is familiar with the background more than I.

THE COURT: Are you prepared to respond?

MR. KIMERLING: I have read the EEOC decision in the Second Circuit. I believe it doesn't bear on the matter.

MS. CARROLL: The Equal Employment Opportunity Commission v. Local 14 was a challange under Title 7 in which the District Court set a standard regarding the prima facie case to be made out in such a claim.

Specifically, the defendant's contention in that case was that the Court must direct its attention in

1 rdsmch 3

2 reviewing the question of whether or not a disparate
3 impact had been made by reference to post-1972 higher rate
4 of minorities. The Court indicated that the remedial
5 purposes of Title 7 were prospective in origin. The purpose
6 of the statute was not to retaliate where an employer had
7 in fact, since the effective date of the statute, taken
8 affirmative steps to remedy any disparity that existed
9 betewen the minority applicant pool and the minority higher
10 rate.

11 Applying that logic to the case at bar, the
12 statistics that were adduced at this trial indicate that
13 minorities constitute, approximately 18.7 percent of the
14 relevant available labor force, that is, the group of
15 persons with high school diplomas in the SMSA, that is,
16 New York City and the outlying conferences of Nassau,
17 Suffolk and Westchester.

18 While, on the other hand, the minority higher
19 rate for the New York City Police Department since 1972
20 has been 23 percent, clearly then there is no disparity
21 in terms of the standard enunciated by the Second Circuit
22 in the EEOC case, and had the District Court applied the
23 correct standard in this Title 7 case, in fact there would
24 have been no finding of a prima facie violation.

25 THE COURT: I didn't realize or it is my

impression that the EEOC matter was quite different in terms of its remedy than the case before us.

I think what we are talking about before us is an impact which, by virtue of a test, had placed blacks and Hispanics in a position from which they would never recover because it had brought over to the present and they could never receover from that.

I thought the EEOC case ordered hiring on a larger scale in order for the various unions to meet standards, but had nothing to do with discrimination in the past coming up into the present.

MS. CARROLL: Your Honor, I think that the case, while arguably it may be in that narrow context --

THE COURT: I didn't hear you. You mumbled that phrase.

MS. CARROLL: While the case could be arguably viewed in a narrow context, I do not believe that is the thrust of the Second Circuit's opinion.

THE COURT: I don't believe what I have indicated to you is a narrow context. I think your argument is a narrow context.

I am trying to talk about the impact and the present or past discrimination, which I think is still the law.

MS. CARROLL: The examinations in question, looking to the Rand study and accepting the premises there as true, indicated a 3 to 1 pass rate, approximately, for whites as compared with minorities.

The actual higher rate from that exam did not produce the 3 to 1 rate specifically because the defendants took affirmative action to retrieve the minority candidates and made no such effort where white candidates were involved. This resulted in a post-1972 actual higher rate of 23 percent of minorities.

Now, I think that the logic of the Equal Employment Opportunity Commission case is that where an employer takes affirmative action to remedy any possible impact, assuming a pre-72 discrimination, that those efforts must be viewed by the District Court in making a conclusion as to whether or not in fact a Title 7 case has been established.

The logic of the premises is that otherwise the retroactivity of Title 7 would extend back ad infinitum and there would be very little, if any, impetus for an employer to take steps to remedy.

THE COURT: I don't believe, and it is not my understanding as I read the EEOC case, that it in any way changed the underlying purpose of Title 7, which is that

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2 blacks and Hispanics, becuase of past discrimination, are

3 not to be frozen in a position.

4 The problem I have with the argument is that

5 unless these examinations and the seniority of blacks and

6 Hispanics have some effect, they will always have less

7 seniority and always be subject to being fired early.

8 That is what the issue is here, isn't it?

9 MS. CARROLL: Assuming the Court has ruled

10 on the first part of the motion, the second part of my

11 motion deals with the question of whether or not the

12 Court may order defendants to reorder the preferred list

13 or impose quotas upon the New York City Police Department

14 favoring minorities.

15 THE COURT: Now I think you are within the

16 EEOC case.

17 MS. CARROLL: Without holding an evidentiary

18 hearing on the propriety of relief, it is defendants'

19 contention that the Court may not do so specifically based

20 on the holding in the EEOC case, that as part of such an

21 evidentiary hearing on relief the impact of the relief both

22 on employer and employees must be considered, as well as

23 practices and procedures within the New York City Police

24 Department.

25 The defendants are entitled to both evidentiary

1 rdsmch 7

2 submissions and law submissions on the proposition and

3 the Court does not have or may not appropriately order

4 any such reordering until a full evidentiary hearing is

5 held.

6 THE COURT: I think you are arguably now

7 within the EEOC case, and before I can rule on that

8 I will hear from the plaintiff. Before I rule on that,

9 one of the reasons I want to point out on the record

10 that we are here today and that I have not made any ruling

11 was in order to allow the plaintiffs and the City and the

12 Police Department to cooperate and to ease the impact

13 of whatever order would be entered. And the whole purpose

14 of this procedure, since I think it was last Wednesday

15 or Thursday, was in order to ascertain that and do that.

16 While I have not as yet heard a report of what

17 went on in these several days, nor have I heard as to

18 whether it is possible for any hiring on the preferred

19 list to be done by March 31, I want to hear something

20 on that and the reasons in terms of that, before I make

21 any ruling.

22 MR. KIMERLING: I think I can respond to

23 your Honor in regard to the EEOC decision, the distinction

24 of that case to ours.

25 Miss Steinbock is familiar with the things

that have taken place.

THE COURT: I understand that.

Then I want to hear what occurred so that I will be in a position to know whether or not an evidentiary hearing is necessary under the circumstances of this case, or whether the City and the other parties are now engaged in a tactic of noncooperation.

MS. STEINBOCK: If I could speak to that, your Honor:

I would like to refer to my affidavit which I believe your Honor has before you. This affidavit details the work that plaintiffs have done in attempting to effectuate relief in this case since last week's hearing, and if I could just go through the steps as outlined in this affidavit --

THE COURT: I haven't had an opportunity to read it. Give me a few minutes to read it and then I will be able to follow you.

(Pause)

THE COURT: Proceed.

MS. CARROLL: We haven't read the affidavit. We just received it this morning.

May we have a few more moments?

THE COURT: Yes.

(Pause)

THE COURT: Proceed.

MS. STEINBOCK: Your Honor, rather than go through the affidavit which you have just read, I would just indicate that plaintiffs have constructed three separate lists of persons who we believe should be rehired by the Police Department.

Exhibit B, which is the list of those with constructive employment dates prior to April 1, 1971 should be included in the rehirings this week, we believe without question.

Those in Exhibit C who failed exam 7017 and 7046 should also, perhaps even more so, be included in the hirings this week, if, as we believe it is your Honor's opinion, that those examinations were included in your opinion of March 17.

We have also separated out in Exhibit D those members of the plaintiff class who failed examinations which were within your Honor's opinion and may be included in the rehirings, may have a constructive appointment date prior to April 1, 1971 if they were veterans or trainees. We have indicated clearly to the Court that we do not know at this time whether these people were veterans or trainees but we believe that information could

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2 be culled in a matter of three hours.

3 It is our position that those 94 people, I

4 believe, in Exhibit B should, without question, be included

5 this week.

6 THE COURT: In Exhibit B it seems to me --

7 Exhibit B has the greatest amount of information.

8 MS. STEINBOCK: Yes, your Honor. Exhibit B

9 indicates the members of the plaintiff class and how we

10 determined that their constructive date was prior to April 1,

11 1971.

12 THE COURT: That is the only one you do that

13 with.

14 MS. STEINBOCK: The reason is because Exhibit C,

15 for example, are all people who failed examination 7017

16 and 7046. The layoffs which began July 25, 1975 never

17 even went back to those exams, so those people would never

18 have been laid off at all had they passed those exams.

19 We believe the relief which should be ordered

20 by this Court is that members of the plaintiff class should

21 receive a constructive appointment date of the first

22 examination they took; because these people failed those

23 exams, they are by definition those who should be included

24 in the rehirings because they never would have been laid off.

25 We believe this is the only information

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necessary about those people.

THE COURT: I get the point.

What I want to know, though, I want a full explanation on the record of what was done, how you went about it. I have your affidavit and you will file that, but I want a full explanation from you of what happened between when you walked out of here last Wednesday and now.

MS. STEINBOCK: May I proceed?

THE COURT: Yes.

MS. STEINBOCK: After the hearing on Wednesday, March 23, plaintiffs and defendants agreed to meet to determine how the raw data would be gathered from which the constructive appointment dates for members of the plaintiff class could be ascertained.

That afternoon I met with Lieutenant Brennan and members of the Department of Personnel, with members of my staff, and Ken Gordon, who represents the plaintiffs in Acha, to determine what information we would like for during this period.

We agreed that we would look for the score for the examination from which a member of the plaintiff class was appointed, as well as whether that person was a veteran or trainee. That information is reflected on the computer sheets which we have enclosed.

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2 It was agreed at that time that plaintiffs
3 would present at least two persons, if not more, to go
4 through the material to find this information.
5 Defendants agreed also to provide two clerical
6 people to cull the cards to get the information necessary.
7 We agreed at that time to meet at 9:30 on
8 Thursday morning, March 24, to begin this process.
9 At that time we offered the services of two
10 paralegals from our office, as well as Ken Gordon. I did
11 not go on Thursday morning at 9:30 because of another
12 commitment.
13 My understanding, and this can be supported by
14 people who were actually there, was that Lieutenant
15 Brennan came at that time and the procedure was worked
16 out as to how the cards would be pulled, et cetera.
17 Our affidavit indicates that we received no
18 assistance from the Department of Personnel. I think that
19 is accurate in that no one from the Department of Personnel
20 or Police Department ever assisted in the clerical task
21 of pulling the cards and writing down the raw information
22 that we have here.
23 Lieutenant Brennan did, as I understand it,
24 arrive on Thursday morning, and members of the Department
25 of Personnel did such things as point to the appropriate

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file cards, et cetera.

THE COURT: But you had access to them?

MS. STEINBOCK: Yes, but no assistance.

The process for us began on Wednesday evening when I and two paralegals from my office determined from the master computer sheet of all persons on layoff, which numbers over two thousand, which of those people were members of our class, blacks and Hispanics, and this took until 7:00 o'clock the next morning.

THE COURT: You had two paralegals?

MS. STEINBOCK: Yes.

THE COURT: They did the actual work?

MS. STEINBOCK: They did, your Honor. I did part of the actual work and they did work as well. But Ken Gordon assisted us as well in both the actual work and the preparation.

THE COURT: Who is Ken Gordon?

MS. STEINBOCK: One of the attorneys representing the plaintiffs in Acha.

His father, Murray Gordon, appeared in court last week.

THE COURT: I see. You mean Murray Gordon?

MS. STEINBOCK: His son, Ken, who is also an attorney representing the plaintiffs in Acha.

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THE COURT: That is interesting.

MS. STEINBOCK: The process began --

THE COURT: I would suppose if somebody worked on this thing, after you finished or you weren't there, I suppose what we ought to do is get them up on the stand because I want the whole story and I want it from the people who were there.

MS. STEINBOCK: They will speak.

Let me again carry it forward.

As I said, we -- and I participated in this -- and we worked until 7:00 the next morning culling the names of our plaintiff class. We are back at Thursday morning now.

I would ask Tom Rawley, who is a paralegal in our office, who did the work at the Department of Personnel, to speak as to how the cards were actually pulled.

THE COURT: I don't think he can speak like that. I think he is going to have to be sworn and take the witness stand.

(Pause)

MS. STEINBOCK: Your Honor, if I might, before Mr. Rawley is sworn in, indicate how we -- and I participated in this with Mr. Gordon -- determined what we were looking

1 rdsmch 15

2 for and what information we were going to gather, then

3 that may be easier.

4 THE COURT: You may proceed any way you want.

5 There are gaps and I gather that Mr. Rawley will furnish

6 the gaps. So at any time you are prepared for him to

7 tell us what he did when you were not present, that's fine.

8 MS. STEINBOCK: Yes. Determining what took

9 place Thursday morning and what had been agreed upon with

10 defendants, as Mr. Rawley will explain, for each member

11 of the plaintiff class his raw score was determined and

12 whether he was a veteran or trainee at the time of appoint-

13 ment.

14 When that information was gathered, and Mr.

15 Rawley will speak to that, we constructed the constructive

16 appointment dates as indicated here. That was first

17 determined by establishing a median raw score for each

18 examination at issue here, and that was the score at which

19 one-half of all those who had passed the examination rested.

20 It was the halfway point for all those who passed the

21 examination, from information at the Department of Personnel,

22 and again Mr. Rawley will speak to that, that median raw

23 score for each examination was determined.

24 From that median raw score, the median appoint-

25 ment date was determined, and the median appointment date

1 rdsmch 16

2 was determined as follows:

3 The median appointment date of those who received
4 the median score was determined by us to be the median
5 appointment date of that examination. In other words,
6 we looked at the people who received the median score and
7 took their appointment date. That's how we determined the
8 median appointment date for each examination.

9 When the people working at the Department of
10 Personnel came back with the raw data and the median raw
11 score and median appointment date, we then, and I participated
12 in this, determined a constructive appointment date for
13 each person on the list. That is reflected in Exhibits B,
14 C and D to the affidavit.

15 It is our understanding from Mr.Gordon, as
16 well as the information we received, that the cutoff
17 date for this hiring is April 1, 1971. In other words,
18 people with appointment dates before that date will be
19 hired in the next hiring.

20 We have since received some information that
21 the appointment date for these hirings may be up to
22 1973, but we are not certain. We certainly have all the
23 data. So, whatever the appointment date is, we can
24 determine which members of our class should be afforded
25 relief.

rdsmch 17

We assigned an appointment date and we have that data here, as we determined above, to each member of the plaintiff class, and then we determined which were before April 1, '71, and which were after.

Wherever there was a question, either because the computer list perhaps had a middle initial in one set of lists and not in the other, we indicated that by a question mark. We were only able to work with the information we were given access to, and I think any questions that we had are reflected in the data we presented to the Court.

As I indicated before, we separated out the list and have indicated on the list the reason that these people, from our calculations, have a constructive appointment date prior to April 1, 1971.

Again, we have all the raw data and this can be changed if the cutoff date for these rehirings is different.

In conclusion, your Honor, I believe that plaintiffs have, as the Court requested, compiled a list of specific persons to be included in this next rehiring between Friday and today's date, and we have literally worked around the clock on this and have provided the information you seek.

I would ask Mr. Rawley to describe how the information was culled from the Department of Personnel.

(Pause_

MS. STEINBOCK: We have two paralegals who worked on this process, each of whom worked on a different task, so that each of them can testify as to what he or she did.

THE COURT: I am interested in two things. I am interested in the cooperation that was received from the City, and that is what I am interested in, during that period of time.

You have explained the process. I don't think I need very much of that. But if these people were there during the whole period of two days, I want to find out from them what happened, who helped them, and what assistance they got from the City.

MS. STEINBOCK: Yes, your Honor.

B E T H S T E I N B E R G, called as a witness on behalf of the plaintiffs, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. STEINBOCK:

Q Miss Steinberg, will you indicate your place of

employment?

A Davis, Polk & Wardwell.

Q Did you participate in the process which I just described to the Court, that is, the process of determining the data which we presented to the Court here in this action?

A Yes, I did.

THE COURT: When?

THE WITNESS: Wednesday afternoon I was present at the meeting with Lieutenant Brennan and people from the Department of Personnel.

THE COURT: Where was that meeting?

THE WITNESS: That was in Police Plaza.

Then Thursday morning I worked at -- well, it was at Worth Street, 220 Church Street, and the building is also called 44 Worth Street, I think. I think it was the Certification Bureau. I think that was the name of the office. It was on the second floor.

That was where the records were kept and we worked there Thursday and Friday; we worked in those offices.

Q Would you describe, please, the participation of any members of the Department of Personnel, the attorneys present here today, or any other agent of the defendants in gathering the information which we described?

A Well, Thursday morning we met in someone's office. I can't remember their name. I think we were somewhere on the third floor, with Mr. Gordon, Mr. Rawley, a paralegal from Mr. Gordon's office, and Lieutenant Brennan.

Then we proceeded to the second floor and we spoke to employees of that office. They showed us where the records were kept. We told them what we wanted. They told us what was available.

And at various points in the afternoon, while we were gathering our data and we would ask people in the department if they were Department of Personnel people, what office it was there, we asked them for various information and they showed us where this information could be found, in what filerooms or whatever. And they showed us how the information was arranged; if it was computer printouts, how you could read the computer printouts.

Q Did you, at any time during the two days you spent in the certification department, receive any clerical assistance or any assistance in gathering the information from any members of the Department of Personnel or from the defendants? Did anyone help you pull the cards and gather the data?

A No. One woman from the Department of Personnel

1 did, I believe, help Mr. Gordon in determining the number
2 of people who took each test and the number of people who
3 passed each test and failed each test.
4 That was it.
5 THE COURT: From what you have said, when you
6 had questions, they were helpful in explaining things to
7 you which enabled you to read the cards; is that right?
8 THE WITNESS: No. Mr. Gordon's paralegal
9 had read the cards herself. She was the one who showed
10 us how to read the cards.
11 There were also books that had the passing
12 scores of patrolmen who took the examinations, and an
13 attorney from Mr. Gordon's office came in Thursday after-
14 noon and he started to work on those books.
15 I'm not sure who explained them to him.
16 THE COURT: But you said something about the
17 computer printouts were explained to you by some personnel.
18 THE WITNESS: Those were explained to me by a
19 lawyer from Mr. Gordon's office. I actually don't know
20 who explained them to him. I would assume it would be
21 someone from there.
22 THE COURT: How long did you work, Thursday
23 and Friday?
24 THE WITNESS: Yes. We met Friday at 9:00 o'clock
25

in the office and we started to work at 9:00. I believe we left at 1:30, 1:45.

Q You were in court at this last hearing on the 23rd and again at the meeting that afternoon.

Was it your understanding that defendants at both those sessions had agreed in fact to provide personnel to assist us in this record-gathering?

A Yes.

MS. CARROLL: Objection, your Honor.

THE COURT: I don't need that.

Your affidavit says that that is what was so and we don't need that. I just want to find out what went on Thursday and Friday.

I think I have the picture.

Do you have any questions?

MS. CARROLL: Yes, your Honor.

CROSS-EXAMINATION

BY MS. CARROLL:

Q Miss Steinberg, were you present at the Department of Personnel on Thursday morning at the time when Lieutenant Brennan and Mr.Gordon were discussing the method of culling the information from the data?

A I'm not sure I overheard their discussion.

Q Do you recall Lieutenant Brennan advising Mr.

Gordon that three employees from the Department of Personnel would be available for his use?

A I recall that Lieutenant Brennan said that two people would be available in the afternoon.

Q Do you recall Mr. Gordon advising Lieutenant Brennan that, in fact, they would not be necessary once the use -- once the information was explained in terms of what the data contained?

A No.

Q Were you there during the conversation?

A Well, I don't recall him saying that. I guess I wasn't present at the time of that conversation, if that indeed was said.

MS. CARROLL: I have no other questions.

I would like Lieutenant Brennan to testify.

THE COURT: Of course, you may put on anybody you want.

Anything else?

MS. STEINBOCK: Excuse me, your Honor. Let me see if Mr. Rawley has anything to add.

(Witness excused)

(Pause)

THE COURT: I understood that the two of them were working in different offices; is that correct?

MS. STEINBOCK: They were working together and arrived together. They did different tasks.

I would add in closing that, as indicated in my affidavit, we did attempt to present this data to defendants Friday evening in order they may have a chance to review this. We were unsuccessful both on Friday and Saturday. We wanted them to have the maximum opportunity to read this list.

THE COURT: All right.

MS. CARROLL: Lieutenant Brennan, please.

P A U L B R E N N A N, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. CARROLL:

Q Lieutenant Brennan, were you in attendance at the meetings held on Wednesday, March 23, with respect to the collection of data in this case?

A Yes.

At approximately 3:30 we met in police headquarters with Miss Steinbock, several members of her staff, some people from our Personnel Bureau, and Mr. Gordon.

Q Lieutenant Brennan, would you be good enough

to state specifically, if you recollect, who the people in attendance were at that time?

A Mr. Nelson Almonte from our employment division.

Q Who is Mr. Almonte?

A He is the man that I believe in our employment division who is most knowledgeable with statistics and the preferred list -- printouts from the preferred list, all the materials from the preferred list.

He is in fact in charge of the preferred list in our employment division.

Q Who else was in attendance?

A Inspector McNulty, who is the aide to the chief of personnel, and Mr. Wallace, who is a special assistant to the chief of personnel.

Then there was Mr. Ken Gordon, Miss Steinbock and I believe the two people here, whose names I didn't know at the time.

Q When did this meeting commence?

A At 3:30 in the afternoon, by prearrangement. That was at the suggestion of Miss Steinbock.

THE COURT: That was the afternoon after the hearing that morning?

THE WITNESS: The same afternoon, your Honor;

on Wednesday.

Q If you can recollect, can you describe the gist of what occurred at that time?

A Yes.

I had asked Mr. Almonte to bring up all of the lists that we had, all the computer lists we had available, to see if they would facilitate the gathering of the data.

As it turned out, the plaintiffs themselves had a more complete printout list than we did, although nobody seemed to know from whence that list came.

In any event, that list had more information than we were able to provide.

Q What materials did Mr. Almonte bring at that time?

A He brought an alpha list of the preferred list and two other varieties of the preferred list.

Q By "alpha list," you mean a listing in alphabetical order?

A Yes.

Q Was this a minority printout or was this of all the preferred list?

A Entire preferred list with minorities identified on the list.

Q And what were the two other lists that he brought?

A There was a rank order list and a reverse rank order list.

THE COURT: What is that?

THE WITNESS: The preferred list was initially compiled as a layoff list in terms of seniority, so that it would be the rank order of those persons to be laid off. For the recall list, it was reversed.

THE COURT: I see.

Q Were any other materials furnished by the defendants at this time?

MS. STEINBOCK: Objection, your Honor.

I don't think there has been testimony that anything was furnished.

MS. CARROLL: The testimony was that Mr. Almonte brought --

THE COURT: Please. Let's not have any bickering about the question.

A The materials that we had with us were to be presented, if needed.

I also had some material that we had put together on a list of people that we had identified as having failed examination 7065 and 8046. We didn't reach

that point because it was agreed by all parties that it would be best to gather all of the data first before we started arriving at theories as to what the relief should be.

So I suggested to Miss Steinbock that she get all of the data first. Mr. Gordon had some difference of opinion, but Miss Steinbock and I agreed that we should get all of the data.

Then I said that I would set it up at the Department of Personnel the following day, so that there would be space available and people available to help. I said that we would provide at least two people.

Q And when did this meeting terminate?

A It terminated sometime between 4:30 and 5:00 o'clock.

Q Referring to the list that you mentioned as an ancillary source of information in addition to Mr. Almonte's list, can you tell me when that information was compiled?

A That was compiled the previous day and part of that same day.

Q By whom?

A Well, by several different people.

I had sent a member of my staff to the

Department of Personnel to look through the lists 7065 and 8046, and I provided him a list that the plaintiffs had of the minorities on the preferred list in alphabetical order.

They had also designated on that list which of those people had taken these two examinations.

I instructed my staff person to check that information and add any names that he was able to find.

Once that was done, we pulled the personnel folders that were available on each of these people so identified.

Q Where are they contained? Where are the personnel folders?

A Where are they?

Q Yes.

A Right now they are in my office.

Q Where were they at the time you performed this operation?

A They were in the career development division of the Police Department. They were segregated from the old folders because all the people on the preferred list are segregated.

Q How much time was expended by the person on your staff with respect to the compilation of this list you

1 referred to?

3 A He took about three hours to do that list.

4 Q And how much time was spent with respect to the

5 culling of the personnel files at the Police Department

6 by your staff?

7 A There were two members, one member of the career

8 division and one member of my staff, pulling the folders.

9 That took about five hours.

10 I really don't know why it took so long, but

11 it took that long. I imagine they had trouble finding all

12 of the folders.

13 Q And were you able at that time to in fact

14 retrieve each personnel file from your records as had been

15 indicated by the list that you compiled or that was compiled

16 by your staff at the Department of Personnel?

17 A No. We are missing about seven or eight

18 folders.

19 Q And did you make any efforts to retrieve those

20 missing files?

21 A Yes. They may have been retrieved by now.

22 I have people still looking for them.

23 Q What did those efforts include?

24 A The efforts to retrieve?

25 Q Yes.

A Well, beyond my advising somebody to get them because I needed them, I don't know exactly what efforts they have undertaken to retrieve those.

Q How many people were involved in this effort?

A It has to be at least three. It would have to be the supervisor in the career development division and two of his staff members.

Q Now, the following day, Thursday, can you tell us --

A That was not all.

I also then, myself, looked through the personnel folders that I had pulled out and made a check list by date of birth, by date of appointment, by list number, by examination number, by driver's license, absence of a driver's license, high school diploma, anything that would have disqualified a person had he been considered on the earlier list.

Q How much time did you expend on that effort?

A I spent at least three hours going through the folders.

THE COURT: This was on Wednesday night?

THE WITNESS: This was on Tuesday night.

Then, part of Wednesday, after the hearing, after the morning session on Wednesday and before we met

with the plaintiffs on Wednesday afternoon.

Q Does that conclude the efforts prior to Thursday, March 24?

A Yes.

Q Now, what occurred on March 24 regarding the collection of data as ordered by the Court?

A Well, I left something out.

After the meeting with the plaintiffs on Wednesday afternoon, I called over to the Department of Personnel to let them know that we were going to be over there on Thursday morning and to have some people available. I cleared it with the legal department of the Department of Personnel first, and then had them alert the Criminal Justice Task Force, which is a reorganization going on in the Personnel Department, so it has to go through various steps before they get the right people.

Then, by prearrangement, I met with respresentatives of the plaintiffs in Room 335 of the Department of Personnel on Thursday morning.

Q What time was that?

A It was approximately 9:30, but I had gone over there about fifteen minutes earlier in order to seek out the division chiefs to make sure there would be this cooperation and the people available.

I then met Mr. Gordon and these two people, and I still don't remember their names.

Q You are referring to Miss Steinberg and Mr. Rawley?

A Yes.

Q Were any plaintiffs' attorneys in attendance at that time?

A No. Just Mr. Gordon. And I spoke with Mr. Gordon.

Also Mr. Rusky, who is the head of the Criminal Justice Task Force in the Department of Personnel, Mr. Jack Stern, who is his assistant, and the head of the certification section, whose name escapes me at the moment, they all indicated that they had some trouble getting people, but they would definitely provide the people, if needed. They wanted to provide those people who were most familiar with the files, because they would be of the greatest assistance.

When I told Mr. Gordon that we were providing these people, and at that time we said we would have two that morning and possibly a third in the afternoon, Mr. Gordon said, "I doubt they will be necessary." He said, "If you let us know where everything is, give us some space to operate, I don't think we will even need your

1 people."

3 Q Was Miss Steinberg in attendance in this

4 conversation or not?

5 A She was in the same room. I don't know if she

6 heard us or not.

7 Q What occurred thereafter?

8 A We then went down to the certification section

9 and spoke to the head of the division, and I really just

10 can't think of his name now, and he designated the two

11 people who were the most familiar with the files.

12 We all went over to the files and started

13 talking about how we would go about doing this.

14 Q What did the files include, Lieutenant?

15 A They included drawers full of certification

16 cards for each of the eight examinations that we were going

17 to look through.

18 There was some difficulty finding space, but

19 finally they found some desks they could use to compile

20 the data they needed, and they removed the file drawers

21 and removed them to the desk.

22 I know that there were several suggestions

23 made by the people from the Department of Personnel,

24 including the list Miss Steinberg referred to, the list of

25 test scores which that person suggested might be an easier

way of retrieving it, rather than going through each card and checking the card against a list later on.

Q Was that method in fact utilized, the suggestion that you just referred to?

A I really can't say from my own knowledge, because I didn't stay there that long myself -- much longer myself.

THE COURT: You, I gather, stayed until the space was provided and you saw things were operating, and then I gather you left?

THE WITNESS: That's right.

A (Continuing) Then, during the day I talked to Mr. Gordon at least three or four times. Of course, I was talking to him about settling an order in the Acha case, so it wasn't necessarily to do with the Guardian case, but each time I asked him how things were going and whether he needed any assistance.

I certainly let him know if any more assistance was required he could get it, and if he had any problems he should let me know immediately and I would see to it that he got the cooperation he needed.

Q What did he indicate at that time as to whether he needed your assistance?

A Each time I talked to him he said things were

1 going swimmingly and there was no need for any further
2 assistance.
3 Q And what happened thereafter, if anything, with
4 regard to this data compilation?
5 A The following day I again called over to the
6 Department of Personnel and asked them how things were
7 going, and they said they were there working and they said
8 there were no requests made of them.
9 I asked them if they were getting the
10 cooperation that we had promised and I was assured they
11 would get the cooperation.
12 Q From whom did this assurance come?
13 A From Mr. Stern and from the head of the
14 certification division, the name of whom I can't remember
15 right now.
16 Q Did you receive any indication as to the time
17 when this project was in fact completed?
18 A Well, I talked to Miss Steinbock in the
19 afternoon, I think around 4:00, 4:30, possibly even 5:00.
20 Q Did you call her or did she call you, if you
21 recall?
22 A I think we were calling each other.
23 Q What did she indicate to you during that
24 conversation?
25

A She said they had completed the work at the Department of Personnel and were now putting it together at their office, that it would not be ready by 5:00 o'clock, and she asked whether there would be somebody available to accept service at the Police Department later on.

I said no, but that I would be in the neighborhood because I was going to a function in the neighborhood, and I would be there until about 7:30, and she could reach me there.

I did go to that function. I didn't leave early, as Miss Steinbock indicated in her affidavit, but it was a public house and apparently they could not reach me by phone.

I did get a message she had called and I tried to reach her back. There was no answer at HA2-3400 when I called there.

Q Why could not delivery be made after 5:00 o'clock at headquarters?

A There is nobody there to take responsibility for such a document. It could have been left at a desk, but I didn't want to have it lost because there is no provision in the Department to handle after-hours service of any documents. We are the agency for service, and we

1 don't stay open beyond 6:00 o'clock.

2 Q Is there any provision for receipt of such

3 similar documents as you mentioned on Saturday at head-

4 quarters?

5 A No. Saturday was never mentioned in my conver-

6 sation with Miss Steinbock. I assumed if it was not

7 delivered by Friday afternoon, that I would get it early

8 Monday morning.

9 I told her I usually get in 7:30, 8:00 o'clock

10 in the morning, and if I could get to look at it then, it

11 would help me if we were going to have a hearing at 10:00

12 in the morning. I didn't at all indicate that I would be

13 ready to respond by 10:00 in the morning.

14 Q When did you in fact first receive a copy of

15 the data collected by the plaintiffs in the process you

16 outlined?

17 A 10:00 o'clock this morning when I came into the

18 courtroom.

19 Q Lieutenant, have you completed the compilation

20 of the data regarding the PA-15's for persons on the lsit

21 as specified by the plaintiffs' submission?

22 A No.

23 Q Do you have any indication whether the Police

24 Commissioner would be interested or would testify before this

25

Court on a hearing on the question of the impact any reordering of the preferred list would have?

A I'm certain if the Police Commission is required, he would testify on the impact or he would designate that person who is most knowledgeable about such an impact to testify.

If his presence is required, he will certainly testify.

Q Have you received any indication, Lieutenant --

THE COURT: I want to find out what occurred in the last couple of days in regard to compiling the information. If you want to use this witness for some other purpose, you can do it later. I don't want this to expand into other matters.

It seems to me I want to make up my own mind, because the plaintiffs had indicated that the City was not cooperating or have given indications of it, and I wanted to find out whether that was so, and what they did in fact do, and I think I am satisfied.

MS. CARROLL: Then, I take it, the defendants' position as to whether the evidentiary matters would be relevant to the disposition of the reordering issue will be reserved?

THE COURT: I think if you want to raise any

further questions in regard to it, I don't want to be confused, you can put Mr. Brennan or whoever else on at some other time. I am not barring you from putting anything on, but you are moving it beyond where I want it to go right now.

MS. CARROLL: I will reserve those questions to another time.

CROSS-EXAMINATION

BY MR. CROWLEY:

Q Mr. Brennan, when were you first given a copy of our list, the list off which we were working the last several days?

A I was given a copy of your alphabetical list, with your work sheet list and the examinations and the indications as to pass/fails on that list, I believe it was Tuesday.

Q You mentioned that you prepared some similar lists or had people working on similar lists at various times during the past week; is that correct?

A I used your list to work from and I had them verify what you had on your list with respect to the two examinations, and also to get any other information with respect to those two examinations.

Q Did you ever give any of the information you

gathered with respect to those lists to anybody on our counsel's side, if I may call it that?

A No. I didn't give them the information, no.

Q You mentioned you spent a good deal of your own time working on pulling personnel folders, reviewing PA-15's, and so forth?

A Yes.

Q The bulk of the time you spent on this matter you were looking at personnel folders and PA-15's?

A I did, yes, but that was before we had this meeting on Thursday afternoon -- Wednesday.

Q Didn't you mention there were three people who had been working on that task during the balance of the week?

A No. That was before Thursday. They were doing this --

Q Did you need to gather that information to compile lists such as those we presented in court today?

A No.

Q You needed that information to challenge that list, do you not?

A No. I was working on the assumption there would be some pressure to compile an immediate list before the 31st. That was before our meeting on Wednesday afternoon,

at which time we agreed that it would be best to get all of the basic data before we started trying to rush in with a list. So that I just kept the information available because I thought it would come in handy now that we have a list.

Q We had a session on Monday after our appearance in court and we talked about cooperation and getting information and so on. The one area where you had people working was in pulling PA-1t's and personnel folders; is that correct?

A Yes. Those people identified from that list.

Q That information, I take it, would be to see if people were of age, whether they had driver's licences and things of that sort; is that correct?

A Yes.

Q That would be information used to challenge lists such as those we offered in court this morning; is that correct?

A "Challenging" is your word. Trying to construct a viable list.

Q You would use information to knock people off lists?

A To determine whether they would be qualified at the time.

Q Could you add people on the list on the basis of PA-15 information?

A It could confirm some information.

Q But you could not add anybody to the list?

A You would not add anybody but you would be able to verify whether the name was the same person on the list.

Q On Thursday I think you mentioned that you designated the two people most familiar with the records at the certification bureau; is that correct?

A Yes.

Q Were those people designated to partake in this exercise with you identifying so they could answer questions or what?

A They were to partake in the exercises.

Q To show where the right files were, and so on?

A They were to assist, if they were needed, the actual compilation of data.

Q Do you know in fact if they did so?

A I accept the fact they did not because Mr. Gordon indicated they would not be needed.

Q You and Miss Steinbock were trying to get in touch with each other, just to summarize; she reported to you that raw lists were available for your review Friday afternoon, or would be late Friday; is that correct?

A Yes.

Q We undertook to have those delivered either to the Police Department or to Aldo's?

A I assume that phone call I got at Aldo's --

Q Before we get to that point, did she offer to deliver the lists either to the Department or to Aldo's where you expected to be?

A Yes.

Q At some point you got word of a telephone call?

A Yes.

Q Any indication when that was?

A Well, it was about 7:00 o'clock when I was told that there had been a phone call for me, and they thought I left, and they told the party I had left.

Q Did you try to call 422-3200, the Davis Polk number, at that time?

A Yes.

Q The Davis Polk switchboard was open until 11:00 o'clock.

Did you keep trying?

A I let it ring about twenty times.

Q No answer.

There is a full-time switchboard operator until 11:00 o'clock at night.

MS. CARROLL: Objection; argument.

Q There were people at Davis Polk there on Saturday and Sunday.

Did you try to reach them then?

A No.

MR. CROWLEY: I have no further questions.

THE COURT: What I don't understand, Mr. Brennan, is what further is there to do?

THE WITNESS: Well, I haven't had a chance to look through all the material that was given to us this morning.

THE COURT: Did you go over that list -- you have a list of your own, I gather; is that correct?

THE WITNESS: My list was those people who had taken those two examinations.

THE COURT: Those are the people, as I understand it, that have taken two examinations. Those are the people in Exhibit B, is that correct?

MR. CROWLEY: B and C and possibly D.

THE COURT: No. B.

MR. CROWLEY: I beg your pardon?

THE COURT: Those are contained in B? I should not ask you that question because you said you had not studied.

Those are the people in B?

MS. STEINBOCK: Those people, as well as people from other exams who received veteran's credit or trainee credit which would give them a constructive appointment date before April 1, 1971.

THE COURT: What more is there to do?

THE WITNESS: I haven't had a chance to look at their information, as I said.

First of all, lists 7045 and 8046 were completely exhausted or completely canvassed prior to the job freeze in 1970. So anyone on that list had been considered before that.

After the job freeze, because of the affirmative action efforts, these people were recontacted, people who had dropped out or who were lost somewhere in the process.

So the reason they were appointed off those two lists after the freeze was because of the affirmative action process and because the lists were permitted to survive the ordinary four years' expiration date.

So that our first contention would be that anybody that got below the median appointment date on those two examinations had been already canvassed and would have been appointed had they been available for appointment, or had

they qualified at that time. So we can assume either they were not qualified or they were not -- or they had dropped out of the system for some reason.

THE COURT: So, in other words, what you have now done, and I gather you have already done it in part, you can canvass Exhibit B and determine whether or not the people are disqualified for any purposes; is that correct?

THE WITNESS: We can check certain items that are readily available that would ordinarily be disqualifications.

THE COURT: As a matter of fact, you have in fact done part of that?

THE WITNESS: Yes, we have done some part.

THE COURT: So that your task is largely completed, isn't it?

THE WITNESS: As I say, I haven't looked at all of the plaintiffs they put forth. I don't know if they are the same ones I looked at.

THE COURT: You indicated to me you have canvassed the two examinations and B is those two examinations plus people who took earlier exams and had veteran's credits. So I get the impression that your task, the task of the Department, is virtually completed.

THE WITNESS: I haven't canvassed anybody who

took a later examination that had veteran's credits. We haven't addressed all of their theories.

There is some contention as to why we should use a median appointment date and there should be a median score of those who passed and why there shouldn't be a median score of the entire list.

THE COURT: What I don't understand, I thought you and the plaintiffs, in regard to this matter, were going to agree on a method. I thought that is what you were going to do, but I gather I am incorrect.

Thank you very much.

(Witness excused)

THE COURT: Anything further?

MR. CROWLEY: May I make one observation, your Honor?

At our Monday session, we asked the City if they had any other theory about how to go about instructing relief. We said we thought this was the appropriate one, the one that had been used in Acha and the ones used in Chance, and they have not come forward with any alternative approach.

THE COURT: I understand that. I think that's right.

MS. CARROLL: I would like to make a comment.

First of all, we did not come forward with any other alternative approach because we were at the first part of the data gathering, that is, getting a list of persons against whom qualifications would be checked. We knew that any cooperation would be turned into argument that we did have an alternate position.

We clearly have an alternate position and the Police Commissioner or one of his representatives will testify as to that position and why it is the preferred method of dealing with the problem.

The other problem is that Lieutenant Brennan's initial work on checking PA-15's against the list is not completed.

Just a reference to the initial list and a comparison with Exhibit B show there are are many, many more persons. The list that the plaintiffs first compiled was a listing of candidates and next to many of those names were question marks, and there were many gaps in terms of the information.

We have received indication that other persons, in addition to the Police Commissioner, would be interested in testifying and we would like to reserve our right to have a hearing on that proposition.

THE COURT: Fine. We will adjourn until 12:00

o'clock and I will give you an opportunity at that time to have the Police Commissioner or anybody else over here to testify.

MS. CARROLL: That is entirely impossible for us to proceed by 12:00 o'clock. We cannot check the PA-15 personnel files. I think it would be more honest to say we can't have a hearing. That would be at least more straightforward about it.

THE COURT: Don't go too far, Miss Carroll.

MS. CARROLL: We are entitled to a hearing, a real hearing.

THE COURT: You are having a hearing, but don't go too far. You indicated to me that the Police Commissioner has alternative methods and people can be over here to do it. Then, fine. You have anybody you want over here to testify and the hearing will begin at 12:00 o'clock.

MS. CARROLL: Your Honor, we will not be able to compile the information on the PA-15's by 12:00 o'clock.

THE COURT: The PA-15 is not what I regard as being important.

What you are telling me is methodology. You may at some other time do that.

I want to hear about alternative methods so

I can consider it. Then you and Mr. Brennan can talk about the PA-15's, if we have an adjournment until the afternoon.

(Recess)

(In open court.)

MS. CARROLL: Before the defendants proceed to call witnesses, we would at this time like the record to reflect the fact that at 11:25 today the Court ordered an evidentiary hearing. No prior notice of that hearing having been given to the defendants. Purportedly this hearing --

THE COURT: All right, Miss Carroll.

MS. CARROLL: I am entitled to make a statement.

THE COURT: You are entitled to say anything you want to say but be careful that you are not in contempt.

MS. CARROLL: I will, your Honor. This hearing is purportedly in accord with the procedures set forth by the Second Circuit in Equal Opportunity Commission v. Local 14. It is the defendants' position that they have not been given an adequate opportunity to prepare for such a hearing and we can proceed with the hearing under protest, reserving all rights to contest any conclusions drawn therefrom.

I have spoken with various persons at the Police Department, including Deputy Inspector McNulty, and the Chief of the Legal Division of the New York City Police Department with respect to the calling of Michael J. Codd, the

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Police Commissioner, as a witness in this matter. I have been advised that the Police Commissioner cannot be available until this afternoon. I had previously requested an adjournment of the case until 2 o'clock and have been notified that such adjournment is not at this time possible.

I reserve the right to call the Police Commissioner on another date or later today. In addition I am requesting that the defendants be afforded an opportunity on a continued date to present other witnesses.

It is also defendants' position that this hearing should also include submissions by the defendants with respect to certification from PA 15 questionnaires as to eligibility of candidates for appointment as police officers. We have this morning at 10 o'clock received a listing of the plaintiffs of members of their class, that is, members whom they allege had failed earlier police exams and would be entitled, in their view, to earlier appointment dates. That list contains the names of 94 persons.

The original list supplied to us contained the names of approximately 50 persons. We have not been able to certify from PA 15s the status of the additional persons' names who appeared on the plaintiff's submission and denominated Exhibit B to the Steinbock affidavit.

rdbr 3

Additionally, the defendants would wish to call members of the Police Department with respect to giving testimony on impact of any reordering.

Preliminarily it is defendants' position that it is illegal and a violation of state law as well as constitutional order to order the rehiring of police officers and the bumping of other officers based on an incomplete documentary evidentiary submission which apparently has been ordered today.

The defendants would call as their first witness Lieutenant Paul Brennan.

THE COURT: You will call your first witness when I indicate you may do so. Are you through?

MS. CARROLL: I have nothing further to say.

THE COURT: Is there any statement you want to make?

MR. CROWLEY: No, your Honor.

THE COURT: I want the record to reflect the fact that my decision on the merits of this case came down on the 17th of March, and we have had hearings in terms of the implementation of that matter on the 21st, the 23rd and today.

As early as the 21st, I think I am not mistaken from the record, there was an indication on the part of the

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defendants that they wanted a further hearing. On the 21st and the 23rd, the Court attempted to get the parties to find out what the difficulty was in order to have the reordering in time, if possible, by the 31st and in order not to have any disparate impact on the working of the Police Department.

The parties on the 23rd were agreed to seek to -- at least I thought they had agreed -- to seek to see what could be done together, to see whether a viable list could be secured in time for presentation to the Court today. The plaintiffs have presented a list and the record reflects what happened in the meantime.

The defendants have presented an application indicating that they want a hearing, and that was filed this morning and I therefore would have to assume that they were contemplating the hearing, that they had it in mind and it is not a hearing which has been forced on them by the court.

I would also assume that having asked for the hearing in their order to show cause, that they would be prepared for it,knowing full well that the critical date is March 31st. They also have asked for a stay.

I gather if we do not have the hearing today they will have in effect been granted the stay without

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it being asked for. I am of the view that these matters must be completed in time so there will be no prejudice to the plaintiffs and their class, that they are entitled to have positions by the 31st of March and by the 1st of April. If it can't be done, that's something else. But I am not convinced it cannot be done. Plaintiffs have certainly worked very hard in an attempt to show that it can be done without having any difficulty in terms of the Police Department itself.

Now you may call your first witness.

MS. CARROLL: I would like to make an additional statement, if I may.

It seems to me that the Court has confused the purpose of the hearings that were held on March 21st and March 23rd.

THE COURT: I haven't confused the purpose of any hearing.

MS. CARROLL: If I might proceed.

THE COURT: I haven't confused any hearing.

MS. CARROLL: My recollection of those meetings is that we were gathered for the purpose of determining whether or not a list could be established of presumptive eligibles, that is, persons who could show that they had taken earlier police officer examinations.

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It was my understanding at that time that that would be the first part of a two-pronged factual inquiry with respect to establishing eligibility for reordering the preferred list.

The second part of that endeavor would be once the list was developed, to have the department, by virtue of examination of the PA 15s, determine whether or not eligibility in fact could have been established at the earlier date.

Now, that second aspect of the inquiry --

THE COURT: You said that this morning. You don't need to repeat that. You have already made that statement this morning.

MS. CARROLL: The other part of our position is that the Second Circuit in the Acha case specifically discussed the type of hearings that were appropriate in a case of this kind. When we first submitted the order to the Court, the Court was predisposed to sign the defendants' order at that time, with an understanding that we would move towards expedited hearings on each individual case.

THE COURT: I certainly was.

MS. CARROLL: The Court has changed its mind on that. The defendants, in submitting an order to

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show case with a request for hearing regarding the factual issues here, did not contemplate a hearing on 25 minutes notice. I think that the request that the hearing be adjourned until 2 o'clock was a reasonable and fair one, and the position that the Police Commissioner of the City of New York should be ready on 25 minutes notice is unreasonable.

THE COURT: That is a ridiculous statement. I didn't ask the Police Commissioner to be ready. You indicated to me in your statement that you had a number of people that were ready to testify in regard to alternative methods. I haven't indicated anything about the Police Commissioner. In any event, let's proceed. If you have anybody to testify, let's proceed.

MS. CARROLL: I now call Lieutenant Brennan to the stand.

P A U L B R E N N A N, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. CARROLL:

Q Lieutenant Brennan, can you describe your present employment?

THE COURT: We know who Lieutenant Brennan is.

rdbr 8 Brennan-direct

MS. CARROLL: I would like to create a record. The Second Circuit I am sure will be interested in it.

Q May I have your employment, please?

A Lieutenant with the New York City Police Department assigned to the Legal Division as an attorney for the Department.

THE COURT: And counsel for the Police Department in this case, is that correct?

THE WITNESS: Acting as counsel for the Police Department in this case.

Q As part of your duties with the Legal Division, Lieutenant Brennan, has work on this case, that is the Guardians Association v. the Civil Service Commission been part of your duties?

A Yes.

Q Lieutenant, how long have you been with the Police Department?

A Nearly 18 years.

Q And are you familiar with the hiring practices that have obtained in the New York City Police Department since 1968?

A Yes, I am.

Q And are you familiar with the examinations for police officer from which hirings were done from 1968

to present?

A Yes, I am.

MR. CROWLEY: Objection, your Honor, if I may. If Mr. Brennan is to be offered as a fact witness, I question the appropriateness where he has been appearing as counsel for the Police Department throughout this phase of the litigation, I wonder if it is appropirate to have him offered as a fact witness on the merits of alternate forms of divestiture as opposed to a fact witness on our discussions. If he is being offered in the nature of an expert, I think that is objectionable.

THE COURT: Well, quite practically I don't know what he is being offered as. All I know is Miss Carroll is attempting to show or wants to show he has familiarity with the examinations of the department. I trust that is far as it is going. In any event, we will wait and see.

Q With respect to hirings done by the Police Department, can you outline the periods during which the Police Department actually hired for the period 1968 through the present?

A Well, I can answer your question roughly. In 1968, 1969 and the beginning part of 1970 there was some --

THE COURT: What is the purpose of this?

What is the purpose of this kind of inquiry?

MS. CARROLL: My understanding was that we were having an evidentiary hearing on the propriety of various types of relief. We have before us one kind of relief which the plaintiffs have offered, that is, the reorganizing of the preferred list based on a median appointment date. That median appointment date is derived from several examinations.

Now, the factual basis that surrounds the actions of the Police Department with respect to hires and fires during thisperiod is relevant to that. And Lieutenant Brennan is going to testify as a fact witness as to what occurred during that period.

MR. CROWLEY: Your Honor, if I may, if we are going to have witnesses in effect, this is an argument about appropirate relief and Mr. Brennan is a lawyer and let him speak as a lawyer and not as a fact witness.

THE COURT: I thought your purpose of having an evidentiary hearing was two-fold: One, to enlighten the Court as to what effect, if any, would be had if the Court was disposed to sign the order the plaintiffs have submitted and why that can't be done; secondly, the reason for it. That is the only purpose I can see for this hearing and so I sustain the objection.

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MS. CARROLL: Our view of the hearing is also to establish the factual context that in part refutes the plaintiffs' submission on Exhibit B. That's the second part of this. The issue is not only whetheror not the relief -- what is appropriate relief in this case. The other part of the issue here is whether or not the list as submitted by the plaintiffs should be the vehicle for the rehires.

THE COURT: It seems to me, you told me in terms of that, that he would have to look it over, and so forth. If he is in a position to go over that list and indicate in what it's in error, name by name, and give me a counterlist for it, I think that would be helpful. But I don't want any long testimony about that. He has gone over the list. He says there are some people on that that he would have to check. If he has done his checking and presents a list as to why this list is not valid or what names should come off that list, then I think we would have something. But I don't think you tlld me this morning --

MS. CARROLL: I believe he can do that in part. To that degree I would offer his testimony.

THE COURT: If he is going to dealwith what I want him to do, that is to deal with the list, and not with any abstract testimony. Let's deal with the list.

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MS. CARROLL: Was the objection to the last question sustained?

THE COURT: Yes.

BY MS. CARROLL:

Q Have you had occasion to go over the preferred list?

A I have had a number of occasions to go over the preferred list for different reasons.

Q With respect to the persons presently on staff who would become permanent police officers on March 31st, can you describe that process, please, indicating the numbers of people involved and their duration on staff?

A First of all, the preferred list is made up of 2,684 police officers who were laid off on June 30, 1975. This list was structured in rank, order by date of appointment or adjusted date of appointment. None of these police officers on the preferred list had an actual date of appointment prior to 1973. Everyone on the preferred list either has a date of appointment for preferred list purposes of 1973, and in cases where it is earlier it is because of some constructive seniority, some priority service or veteran's preference.

In March of 1976 there was an opportunity for the first time to recall police officers from the preferred

list by using federal funds under a grant by the Department of Labor for 205 positions. These were provisional positions --

THE COURT: I thought the question was about the people who were going to be hired on the 31st of March.

THE WITNESS: These are those people.

THE COURT: These are the people?

THE WITNESS: Yes.

THE COURT: I thought those were permanent appointments.

THE WITNESS: On March 31, 1976, these 205 officers were provisionally appointed.

THE COURT: You have asked him about March 31, 1976? I am talking about March 31, 1977.

MS. CARROLL: He will get to that. He is just explaining who these people are.

Q You may continue, Lieutenant Brennan.

A Under the Department of Labor grant there was a decision made to use the preferred list because it was the most orderly and predictive entity available from which to make appointments. The first 205 -- well, the first 205 people on that preferred list in rank order were screened and were questioned as to whether they would be available for the provisional appointment. They were

offered that position. It was a one-year position as a provisional police officer, and it required canvassing approximately 240 persons on the list in order to get the 205 to accept that position.

THE COURT: So I am to understand that the 205 provisional appointed then March 31, 1976, those 205 will be given permanent positions on March 31, 1977?

THE WITNESS: That is correct.

THE COURT: All right. I think you indicated that to me before and I didn't understand it. Now I understand it.

Q In addition to these 205 what other hires are scheduled for March 31, 1977?

A Well, if I could back up a little. Additional funding became available in August 1976 under a law enforcement assistance administration grant for 60 positions, also for a one-year period. In that case there was an application for a temporary restraining order in this court and that was denied.

Q How many names were exhausted on the preferred list to hire the 60, if you know?

A Well, there was an additional consideration there because in the interim period there was a suit brought by policewomen who were laid off, and Judge Duffy

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in that case had granted summary judgment to 32 of those policewomen, who were granted a constructive seniority date of May 18, 1970. By virtue of being granted that date they then would move to the top of the preferred list. So that as a stipulation in that case, the Acha case, 32 of the women were given the provisional jobs under the LEAA grant and 28 others made up the 60.

Q When was that, Lieutenant?

A August 13, 1976.

Q What was the duration of that grant?

A One year.

THE COURT: That has nothing to do with the 31st of March, does it?

THE WITNESS: It oes, in that the Department of Labor is to expire on March 31st and there are no funds available in that grant any more to retain those people.

Ordinarily they would be terminated as the grant expired. But because of economies realized through excess attrition the city has located sufficient dunds to retain these people to avoid terminating them now on March 31, 1977. And because they are using city funds it automatically creates the permanent position of police officer.

So they will be restored to the permanent

position of police officer on March 31st with the city funds.

THE COURT: These are not federal funds?

THE WITNESS: No, these are city funds.

THE COURT: All right.

Q In addition to the --

THE COURT: We are now still talking about the 205?

THE WITNESS: Yes.

THE COURT: So the 205, we talked about those. So the 60 we have also talked about, they have nothing to do with the matter?

THE WITNESS: Yes. But if there is any bumping in this 205, they woud then have preference over some people in the group of 60. So they would bump down into the LEAA grant positions, and the people in the LEAA grant positions would then bump down into CETA, C-E-T-A.

Q Would you elaborate on the CETA funding and the expiration date of that?

A CETA, which the Comprehensive Employment & Training Act, those funds became available early this year and the projected hiring date was the middle of March for approximately 250 positions, again in order of the preferred list.

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Under that grant the --

THE COURT: But they were appointed on the 20th, weren't they, or the 21st?

THE WITNESS: All but 40, 210 were appointed on the 17th or the 18th.

THE COURT: So again pursuant to an agreement that they would understand that their rights were dependent upon whatever happened in this case with regard to it?

THE WITNESS: Yes, sir. 40 to be appointed on April 1st, 40 additional people.

THE COURT: How many more people other than the 205 are going to be given permanent apoointments on the 31st?

THE WITNESS: In addition to the 105 there are 25 --

THE COURT: I thought you said 35 or more.

THE WITNESS: There are 25 women whohave gotten a judgment from the court in the Acha case. The order was signed Friday afternoon in that case. That incorporates an agreement between the counsel for the parties to offer permanent positions to the women on March 31st.

In addition to that, because of the requirements of the CETA regulations on their maintenance of efforts provisions, if you offer a position to someone who has more seniority or less seniority than

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another person, ostensibly that persion could be bumped out and the CETA position could be lost.

So to clean up the list they canvassed or recanvassed all those who had previously declined to accept any provisional appointments under the two grants. This was approximately 25 people. Out of those they were only able to get reponses from I believe it was fiveor six people, out of which only three were available for appointment on the 31st.

So that in addition to the 205 people on the Department of Labor grant, the 25 women for whom judgment has been rendered by Judge Duffy, there are these three additional people who appeared at the top of the preferred list but had previously declined to accept a provisional appointment. The consequences of refusing a permanent appointment would be removal from the preferred list.

THE COURT: So tht am I to understand that on the 31st there are 205 actual appointments that are going to be made permanent?

THE WITNESS: People on the job a year, yes.

THE COURT: Possibly three more and the 25 women?

THE WITNESS: Yes, sir.

THE COURT: I thought I was told by Miss Carroll

there were going to be 35 appointments, out of the 205 people there were 35 openings.

THE WITNESS: No. We had estimated in the papers there would be approximately 240 appointments, the 205 and the 35 women. We estimated approximately ten who would be produced from this recanvass of the list, but that only produced three people.

BY MISS CARROLL:

Q Will you describe the impact of bumping from the group of employees that you have just described? By "bumping" I mean that the preferred list be reordered so that minority persons who could establish adjusted seniority dated earlier to the 205, you would replace the 205 as officers in the Police Department. Can you give us the impact on the proposed CETA hires that you have described that are anticipated to occur in the Police Department some time in the near future?

MR. CROWLEY: I would like to renew my objection. I think this is particularly appropriate for counsel's argument. I don't see why Mr. Brennan is a fact witness on this kind of thing.

THE COURT: Objection sustained. I think that is so. I think that is argument.

Q Lieutenant Brennan, what is the date scheduled

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for the CETA hires following the March 31st hires?

A The next CETA hires will be April 1st.

Q How many persons are going to be hired then?

A 40.

Q And what would be the process in terms of appointing those persons if persons were removed from service by virtue of reordering of the preferred list?

THE COURT: Well, I don't see any purpose that is going to be served with that. We are not dealing with the 31st and we are dealing with its impact and how many are going to be hired. I don't want to hear anything about that.

MS. CARROLL: We give this information so the Court will understand the financial implications with respect to the CETA act with respect to hirings. That is a critical issue here.

THE COURT: I think you can recite that. That is nothing in terms of fact. As far as the provisions of the CETA hearings, you can give me the provisions and file it. There is no necessity to have him testify about that.

I want to find out about this list, which is what you told me he would be dealing with.

MS. CARROLL: Part of the defendants'

position as to why the reordering should not be done at this time and in the manner suggested by the plaintiffs is the point that such reordering will impact negatively on the receipt of funds under CETA or will result in the loss of any job whatsoever for the 205 who are on staff. I think that the Court should be apprised of the consequences of reordering. The department views that as part of its position.

THE COURT: That the interpretation, isn't it?

MS. CARROLL: No, it isn't. It is a matter of fact.

MR. CROWLEY: Miss Carroll seems to be able to state it very well. I suggest we can do that without having a witness as an intermediary.

THE COURT: You can tell me what that is.

MS. CARROLL: I can't. That's why I asked Lieutenant Brennan.

THE COURT: Then Lieutenant Brennan can go down as a lawyer and tell me what that is. He doesn't have to sit up on the witness stand for that. Or he can submit it in a brief.

BY MS. CARROLL:

Q Have you had conversations with persons at the Police Department regarding the proposed hirings for March

31st and the impact on the Police Department by any reordering of the preferred list at that time?

MR. CROWLEY: I object again. The appropriate course will clearly be to have those people present. To do so otherwise would be hearsay.

THE COURT: He certainly is not in any position to tell us, particularly in view of the fact that I understood that these were the various people that Miss Carroll wanted the Court to hear and so there is no point in the Court hearing it second hand.

A I have taken part in conferences on the subject with the Police Department and Police Department personnel.

Q Do you recollect when those conversations occurred?

A I can't give you precise dates, but the conferences have been held, let's say, fairly frequently during the past month or so, both with respect to the Acha case and this case and the impact of both cases on the rehirings.

Q And do you recall who these conversations were had with?

A Yes. I have had some conversations with Brian Morris who is the counsel to the Department of

Personnel. I have had some conversations --

THE COURT: I think this is a waste of time. I don't see any reason for you to tell us or to have in the record that you had conversations with various people when you can't tell us what the conversation is. These people are going to tell us about their views and why any reordering is going to be bad, and we will hear them.

Q Lieutenant Brennan, have you done, as part of your work in this case, research of the alphabetical list supplied by plaintiffs' counsel of members of their class who are on the preferred list?

A I have done some preliminary research, yes.

Q And when was that research done?

A Tuesday and Wednesday of this week.

Q And do you --

THE COURT: I don't know what we are talking about. Is that list in evidence?

MS. CARROLL: I don't believe it is, but we had testimony on this earlier.

THE COURT: I am talking about the alpha list or some list that you supplied them, is that in evidence?

MR. CROWLEY: We have never seen it.

MS. STEINBOCK: It is not, your Honor. This is a list of all our class members alphabetized, which we did

supply to the defendants.

Q Did you review that list specifically with respect to --

THE COURT: No. The question is did you supply him with a list?

MR. CROWLEY: We referred earlier to a separate alpha list which Mr. Brennan obtained.

THE COURT: The question is did you review a list that you spplied? I want to know whether or not that list was in evidence. I gather it isn't.

MR. CROWLEY: Excuse me, I misunderstood.

THE COURT: I was trying to be sure I can follow it.

Q Will you describe the list so there will be no question as to what we are talking about.

A This was a list provided by Miss Steinbock which was and alphabetic list of the minority members on the preferred list by name only. It referred to approximately nine or ten examinations, indicating on that list whether the person passed or failed. In many cases there was some question as to whether the name on the list was the same as the person that they had found either passed or failed the test. In those cases that was noted on the document.

I had somebody recheck that list with respect

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to two examinations, and the results that I obtained from that individual I then had the personnel folders pulled and examined or -- not really examined but looked through the PA-15 with respect to those names. Approximately, I'd say, 40 or 50 names.

Q With respect to examination 7065 and 8046, can you describe when those lists were screened and reviewed initially by the Police Department and the Department of Personnel for purposes of hiring police officers from that list?

A That would have been during the period 1968 and 1969.

Q And do you know whether or not that list was in fact completely reviewed, that is, with all names on the list examined at that time?

A Yes. I verified this on Thursday by checking the certifications for both examinations, and the entire list had been certified and screened by the end of 1969.

Q What does that mean, Lieutenant, certified and screened?

A That means that when the Police Department asks for appointments of police officers, the Department of Personnel certifies a number sufficient to give the department what they need in the way of personnel so that

they would always certify some more than the department required because some people would be eliminated.

Those names are then sent to the Police Department and an investigation takes place by the Police Department, background investigation, based on the application form that the candidate has previously filled out. So that when time for certification takes place in list number order, the investigation is very nearly completed. The candidate is then either appointed or not appointed based on his qualifications and he can be rejected on two bases:

One, he is disqualified pursuant to the rules and regulations of the Civl Service Commission in that he doesn't meet the requisite requirements for the position, or he is passed over by the Police Commissioner exercising his one of three options under the Civil Service law.

MR. CROWLEY: May I object again on two grounds?

First of all, I question seriously whether it is appropriate to have counsel in this case putting in this factual background. If they wanted to put this in the reocrd, they could have done it by affidavit as we have done with our material.

Second, it was my understanding what we

were going to take evidence on at this point was alternate approaches to reordering this list. It seems to me this is more in the nature of a filabuster than a hearing on that subject. I particularly object to using Mr. Brennan and on this matter. He is capable as a lawyer telling your Honor what the nature of this is. It would be quicker.

MS. CARROLL: His testimony is factual. He is testifying how appointments were made from these earlier lists and when they were exhausted, which is relevant to the median appointment dates to these lists?

MR. CROWLEY: Is Mr. Brennan going to withdraw as counsel in this matter?

He certainly should think about it.

THE COURT: You are probably right, but there is no jury and I suppose under ordinary circumstances that would be the case. However, I don't think what Mr. Brennan is telling us is relevant at all. I think that conversation, and so forth, it appears to me is the kind that would have been appropriate on the 23rd if you and the plaintiffs had disagreed as to the procedure that was to be followed in terms of making whatever records were available. This is something entirely different than that. I thought there had been agreement on that.

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Now you come in and Mr. Brennan is going to tell me something else.

MS. CARROLL: The sole agreement is that we would make people available and make data available for a listing.

THE COURT: You make them available and apparently your theory is that you make them available so that the plaintiffs and the court would go through what you regard as a useless exercise. It appears to me that if they were using dates that you regarded as being inappropriate, the matter should have been brought to my attention and the matter should have been cleared up.

If there had been disagreement --

MS. CARROLL: Your Honor --

THE COURT: Be quiet for a moment and let me finish, please.

If the plaintiffs and Mr. Brennan had not agreed upon what was appropirate, what with the appropriate lists from which the names were to be called, and so forth, it seems to me that that meant that you were not reaching and accord. Otherwise, the purpose I had in mind was that the two groups, with Mr. Gordon's help, I thought, were supposed to determine whether or not a viable list could have been secured in time to be effectuated by the 31st.

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What you are now indicating to me is that the plaintiffs went through a process, you didn't agree with what they did, you didn't tell them you disagreed with what they did and now you come up here, instead of having worked together for 48 hours or for the four days since last Wednesday, that we are where we were Wednesday when I asked you two to cooperate. I am not going to listen to that.

MS. CARROLL: Your Honor, what I was trying to make clear to you was that with respect to two examinations, the plaintiffs might well take the position that the appointment date is the later date. That's the post '73 date. We are submitting testimony now to indicate that from our point of view these two lists were exhausted prior to '70 and if anyone was qualified they would have been qualified at that earlier date because we screened the entire exams. The plaintiffs needed this information to pursue their point of view. I think in fairness we should be able to present our point of view --

THE COURT: Miss Carroll --

MS. CARROLL: May I finish once, please?

THE COURT: You may finish when I am through, Miss Carroll. You had better understand that.

Mr. Brennan has given me the testimony that he

is indicating now, and he has already testified to that this morning.

MS. CARROLL: I wanted your Honor to understand which exams were in questions. It is not all the examinations; it is only two.

THE COURT: Tell me what they are. I don't need him to go thorugh the whole process if all you want to do is tell me examinations. Then just give me the numbers and put that in the record.

BY MS. CARROLL:

Q Would you tell us which examinations in fact were screened and totally exhausted in terms of selection of candidates from it prior to the freeze in 1970.

A Examination 8046 and any other earlier examination, but the relevant examination for this case is 7065. So it is 8046 and 7065.

Q Pursuant to that process any person who is eligible at that time from those two lists were in fact certified by the Department of Personnel, is that correct?

A Well, they would have been reached for consideration prior to 1970, yes.

THE COURT: It is 1 o'clock. We will adjourn until 2 o'clock. I am going to listen to any evidence

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but a decision is going to be made in regard to what is going to be done on this matter today.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

(In open court.)

MS. CARROLL: I am sorry for our delay but during the luncheon break I was attempting to reach the Police Commissioner. He is at a meeting but he is not in the building as I thought he was. He is in Staten Island. He is en route to Manhattan and perhaps we might be able to take a recess at some point so that I could contact him personally. I have not been unable to do so as yet.

THE COURT: All right.

MS. CARROLL: I would like to recall Lieutenant Brennan for a few more questions and then we have another witness.

THE COURT: All right.

Mr. Crowley will have an opportunity to ask him any questions he wishes.

MS. CARROLL: Certainly, your Honor

P E T E R B R E N N A N, resumed:

DIRECT EXAMINATION (Continued)

BY MS. CARROLL:

Q Would you be good enough to describe how the hirings for March 31, 1977, in fact included the

the 25 women to be hired under the Acha case.

THE COURT: Well, I think he explained that to us this morning.

MS. CARROLL: There is some detail that apparently we didn't bring out and I think it would be helpful.

THE COURT: Well, don't go over what you did this morning, Mr. Brennan.

I also gather those 25 were taken from among those that were hired earlier, weren't they, pursuant to Judge Duffy's order?

THE WITNESS: No.

THE COURT: You told me that 20 something women were hired pursuant to Judge Duffy's earlier.

THE WITNESS: 32 were hired in August of '76.

THE COURT: And these 25 were from among that list

THE WITNESS: No, these are 25 additional plaintiffs whose cases had been decided in time for the hirings.

MR. CROWLEY: May I renew my objection? Now that we have a live witness, could we go through him and not turn to counsel for these background information?

THE COURT: It would be better, Miss Carroll, if somebody else can do it.

MR. CROWLEY: It is so much easier for us lawyers to testify. Both sides would enjoy that but it is inappropriate.

MS. CARROLL: In addition to working on this case, Mr. Brennan was the person supplying factual material to Corporation Counsel's office in the Acha case, so he has personal familiarity with the facts.

THE COURT: I will hear it, but you realize that it is regarded as almost unethical for a lawyer to be testifying in a case in which he is sitting as counsel.

MR. CROWLEY: I would say for the record that we take that position.

THE COURT: I think it is more of a matter where there is a jury, but if there is no one else available I am not going to bar it for that reason. But I think you should use him only for what is necessary, Miss Carroll.

THE WITNESS: Well, if my ethics are being questioned I don't know that I should continue as a witness, if that is the position here. I don't see that it is unethical because I in fact ook part in the negotiations in the Acha case.

THE COURT: I don't remember ethics are not being questioned. It is the general rule that that is not done. As a matter of fact in many instances it is not allowed.

You either have to resign as counsel for the parties in order to testify. But I am making an exception in this case because there is no jury. I am not questioning your personal ethics here.

Q Do you recall the question?

A Yes.

With respect to the hiring of the 25 women there was negotiations in the Acha case with counsel for both parties concerning the delay in reaching some determinations by the Special Master appointed in that case and the adoption or rejection of those findings by the Judge in the case. And that was considered with respect to the impending hiring of both CETA and the impending termination of the 250 people under the grant. So that the aims of the negotiation were to effect some sort of relief without the necessity of bumping any active members of the force. So that in determining how much money was available for permanent rehires out of city funds, the 205 positions were considered first because those were people who were on staff. In order to, as I mentioned before, clean up the list for CETA hirings, it was estimated there would be approximately 24, 25 positions that had to be filled from people who had previously declined positions.

After that was looked at a little more closely,

that estimate was way overboard so that there would be ample positions, possibly, among that 25 to take care of the women. So that if we exceeded that number by 1 or 2, it was believed that we could still fit within our budget projections.

Now, the women, since they were senior to all CETA people because of the judgment in that case, had constructed dates senior to all CETA people, they had to be accommodated first under our agreement with CETA. And since it was difficult for them to have qualified for CETA because they had never even considered the position yet, it was also considered a much easier way to take care of them on tax levy money. And this was all discussed with counsel for both sides and we reached a stipulation on the hiring of the women which included this provision to hire them on permanent lines and they waived their rights to any CETA hirings.

Q If the 25 positions for women had not been found in the funding for the March 31st hires, what was the potential impact on the CETA hires, would they have gone through?

A They would have been delayed. They could not have gone through on March 18th.

Q Can you explain as to why that was so?

THE COURT: I think this is unfair to the plaintiffs. This is mixed argument and in terms of fact I am getting argument as well.

I think some of these things, Miss Carroll, have been talked about, and someone who is not operating as counsel for the department could give us all these facts. I think that is the better form. I think you ought to do that. This is argument. Mr. Brennan is arguing his case as well from the witness stand. I think you ought to get somebody to give us facts.

BY MS. CARROLL:

Q Turing to the layoffs of 1975, Lieutenant Brennan, was there any distinction in terms of layoff dated based upon a class within the civil service, for example, probations?

A Well, under the law the last hired-first fired law, Section 80 of the Civil Service Law, you have to layoff people in the lowest class first. The lowest class being that class of probationers first. And that class is considered as one group. So that seniorty only counts among members of that class.

Q What was the last hiring date prior to the layoffs?

A It was I believe October 7, 1974.

Q And what was the date of the first layoffs?

A June 30, 1975.

Q So there would be among persons on the preferred list the people who in fact are probationers?

A Yes, sir.

MR. CROWLEY: I object. If he is going to answer questions, he should at least not be led. This is absurd.

THE COURT: Sustained.

Q Are there members of the probation class that you referred to among the persons listed on the preferred list?

A Yes, but I don't know how many.

Q Lieutenant, can you give me an ethnic brakdown of the 205 persons presnetly on staff and who would be the subject of the March 31, 1977 readjustment of physical support for them?

MR. CROWLEY: I renew my objection.

THE COURT: Sustained.

MS. CARROLL: May I have the grounds for the objection?

MR. CROWLEY: I object, as I have throughout, because he is testifying as a witness on factual matters and there is a witness here who can put this in the record.

THE COURT: Plus the fact that that is not the focus that I am looking into in this particular hearing. Objection sustained.

MS. CARROLL: I would like to make an offer of proof with respect to that. The offer of proof is that Lieutenant Brennan would testify that if the 205 people who are presently on staff by virtue of a United States Department of Labor grant, 164 of those persons are non-minority and 41 of those persons are minority.

MR. CROWLEY: Object again on the grounds that is not the purpose of this hearing, as your Honor said. We are talking about alternate procedures to solve this problem.

THE COURT: That has no relevance to the issues before me. In any event, ask the next question.

MS. CARROLL: Your Honor, I would like to clarify why --

THE COURT: I don't want to hear any more of your clarifications. Please ask him questions. That is what you are here for. Ask him whatever questions you want to ask.

Q Lieutenant Brennan, would you be good enough to give me the breakdown of the CETA hires scheduled for -- that occurred on March 18, 1977?

THE COURT: I don't see where that has any relevance to the issues before me.

MS. CARROLL: The relevance is that if there is a bumping process, the impact --

THE COURT: You said that before. You said that this morning and I don't see where any more details can be added to that. You told me that this morning. I don't see any point in going into that any further.

MS. CARROLL: Your Honor, I don't believe he testified as to the ethnic breakdown of the CETA hires this morning.

THE COURT: The ethnic breakdown of the CETA hiring has no relevance at all to this case.

MS. CARROLL: I would like to make an offer of proof then.

THE COURT: That I am not going to allow because you made your offer. I have told you, the offer of proof you are going to make in regard to ethnic breakdowns has no relevance to what you tell me that you are concerned about. It has no relevance to any issue that is before the Court.

MS. CARROLL: Yes, but I nonetheless would like to make an offer of proof on that because that ruling may in fact be incorrect and I would like it to be in the

record as to what the proof would be were we permitted to make such --

THE COURT: I wohk't allow such an offer of proof, not on the ethnic breakdowns.

BY MS. CARROLL:

Q Lieutenant Brennan, have you undertaken an examination of the PA 15s with respect to Exhibit B that was submitted this morning to the Court?

A No, I have not.

MR. CROWLEY: I object again, if it is not too late. It is my understanding we are talking about alternate approaches to relief here, nto the detailed questions of PA 15 problems.

THE COURT: That's the one relevant question that was asked since we have been back.

A No, I have not.

Q From your experience which you previously testified to regarding culling the information from the PA 15s can you indicate to the Court what kind of inquiry would be involved in such an operation?

A What I had initially undertaken to do was to compile certain lits referring to minimum qualifications which either were or werento present at an earlier date that was to be determined as a result of some theory of relief.

THE COURT: Lieutenant Brennan, are you going to tell me anything differently than wha t you told me about the fact that you had the list this morning -- I mean on Tuesday and what you did, thatyou went over the list on Tuesday, the alpha list, to determine whether or not the dates, and so forth, is there anything differently that you are going to tell me?

THE WITNESS: No. My understanding of the question was what I had answered before. I think I already answered that question.

Q With respect to the Acha hearings, Lieutenant Brennan, can you describe the procedure that was utilized in that caseto determine the respect of senioritvof the female plaintiffs in that litigation?

A The hearings were ordered by the Second Circuit --

THE COURT: I am not going to have that. I don't need that in this record. The Second Circuit ordered the hearings and the hearings went on. Why do I need that in this record?

If you want the Second Circuit to take a view of that, you can use that record and go up. There is no point in our wasting time on that.

MS. CARROLL: Your Honor, I know that the

Second Circuit is familia r with that case, but in terms of the hearings that occurred I was not certain that you were familiar with them.

THE COURT: I have been in communication with Judge Duffy on that. If it is for my personal benefit you can save yourself the trouble.

MS. CARROLL: Excuse me?

THE COURT: If it is for my personal benefit you can save yourself the trouble.

MS. CARROLL: Then I will do that.

I have no further questions.

MR. CROWLEY: I am not quite sure how to go about this.

Much of what Mr. Brennan has testified about has been, in my opinion, a matter of lawyer's argument.

I won't examine him on those things and I will try to limit it to factual matters.

CROSS-EXAMINATION

BY MR. CROWLEY:

Q Mr. Brennan,you referred several times to "bumping" in your testimony.

Let me just ask, to make sure I understand, is it your position that if the approach set forth in our draft order were followed, that any police officer who has received a permanent appointment and who has not signed waivers in connection with this litigation, would be bumped or fired as a result of the implementation of the relief which we seek?

A Your reference to permanent police officers is confusing.

Q I mean nonprobationary people or people who have been assigned to permanent positions without having signed waivers in this situation, is there any permanent policeman who is going to be bumped as a result of the relief which we seek?

Q:mg 2 Brennan-cross

A If the relief that you seek is implemented, if it causes any one or two persons who is not-- any number of persons not presently provided for in our prospective hirins to be included in the list, it will bump somebody out of a job, yes.

Q Bump permanent people out of ajob, people who already have permanent assignments as members of the force and who have not signed waivers?

A When you say permanent, these would be provisional at this time also under a grant.

Q The point is you are talking about bumping, you are saying people given temporary assignments or assignments subject to waiver in this situation may be rearranged and lose their jobs, is that correct?

A Yes.

Q You are not talking about firing people who have been given permanent appointments?

THE COURT: Wasn't that contemplated by virtue of what we agreed upon? Is that what you are telling me? Wasn't that the contemplation in July when you and Ms. Carroll convinced me that these people ought to be rehired?

You are not telling me anything different than that, are you?

THE WITNESS: No.

THE COURT: I thought you were.

MR. CROWLEY: The difficulties with this cross is I would like to say at this time, one of the points we made last summer is we thought conceivably defendants would attempt to prejudice our class in this situation by taking this very position. We don't think this is an appropriate position for them to take.

THE COURT: Ask the questions.

Q Going back to March 1976, and prior to that time that those provisional appointments were made roughly a year ago, what were you doing in the Police Department?

A I was in the legal division.

Q Did you have any involvement in the review of steps to be taken in connection with those hirings?

A Yes.

Q Was there any consideration or was there any meeting at which you were present where there was any discussion of the Rand Report, the allegations made in Guardians' 1 and the possible impact on the decisions being made at that time about rehiring in March 1976?

A I believe there was,yes.

Q Was there any discussion of an alternate approach to what was in fact done to take account of the findings of the Rand Report and the submissions of the parties in

Guardians 1?

A I don't think it was in that context.

Q Did the Police Department or the Department of Personnel having considered the Rand Report and the allegations of Guardians 1 take any different steps or did they go down the same old list as if those cases did not exist?

A I misunderstood your question. I didn't know you were referring to Guardians 1. There was no discussion of Guardians 1.

Q It was a discussion of a Rand Report?

A No.

Q Coming down to August of this year, July and August, did you have the same role, were you involved in discussions of the appropriate way to make those recalls this past summer?

A Yes.

Q At that time, prior to the initiation of this litigation, was there any discussion of the Rand Report or the allegations in Guardians 1?

A There was a discussion of the pending litigations, yes.

Q Including Guardians 1 and the substance, that is to say, the Rand Report among other things?

A Including this lawsuit, yes.

Q Prior to the initiation of this lawsuit was there any discussion of the predecessor lawsuit?

A Not that I know of.

Q Was there any consideration or any discussion of the possibility of taking some different course to try to increase the number of minorities that would be recalled rather than just following the old lists that you are aware of?

A No.

Q As long as you are here as a witness, there have been references several times to the idea that the City of New York would lost substantial federal funds if we did not meet this March 31st deadline and hire these 205 people on that date.

Can you explain to us how that woud come about?

A I am not so sure I understand what you are referring to.

Q Am I correct in understanding that there is a risk if you do not meet this March 31st date that the City of New York will forfeit forever certain federal funds?

A That is not my understanding. There is a possibility that some federal funds will be lost.

Q Can you describe that possibility for us so we

know what the considerations are?

We understand they were somewhat under the gun in this situation, that there are funds,in this courtroom, as I have heard in this courtroom, which will be lost to the City if we don't meet that date.

We are working at breakneck pace at our side of the table to meet that date.

What is the pressure?

THE COURT: I believe that representation was made to me. That is what I understood was the possibility.

A The possibility was losing the opportunity to hire needed police officers immediately. If we were not able to straighten out all of the problems with the list prior to March 17th we could not hire police officers by March 17th and the hiring would be delayed.

Q You mean to say if we delay this thing for two weeks that the downside to the City is that there will be two weeks when those people won't be employed and that is it?

A That is not it.

Q What more is there? We ought to understand.

A It is a very complicated situation with CETA because you have the additional problems of qualifications as of a certain date with CETA. With CETA the people have

to be qualified; that means two weeks unemployed, as of the date of application for CETA positions. If that is delayed, those people will remain unemployed.

Q They will stay unemployed just like everybody in our class, is that correct?

A Sure, the same as anybody else.

Q But those people have been hired within the last couple of months, they have been on the job,most of them, those CETA people? They have been working until recently?

A They were hired on March 17th. I don't know who else you are talking about.

Q I was under the impression that most of those CETA people had been working up until within the last couple of months, is that wrong?

A I don't know. I have no way of knowing the answer to that.

Q I am not sure I can ask the question in a way to get a quick answer, but I would be interested to know and I suspect the Court would be interested to know just what the risk is to the City if we don't meet this March 31st deadline with respect to the 205 and the 35 and so on, the risk of the loss of funds.

Perhaps I interrupted you and perhaps you can go

ahead.

A The first risk is that if we don't have some plan to rehire on March 31st, there are 205 people who will lose their positions because that grant expires on March 31st.

Q You mean those funds can't be used-- for example, if we had 205 class members that should be hired on March 31st, those funds would be lost --

THE COURT: He is not saying the funds will be lost. You mean that the time for those 205 people, as I understand your testimony today, the day they were hired on March 31st, 1976, and Rand expires March 31st, 1977-- that grant expires under any circumstances?

THE WITNESS: That is right.

Q Would they in fact be fired?

A Yes, unless we are able to use revenue money.

THE COURT: If they were hired on March 31st, those 205 will be fired but that is not an indication of how you will lose money. That is a different question.

THE WITNESS: The loss of money-- the possibility exists that if we don't or are not able to fill all the CETA requirements and CETA regulations and our requirements with CETA, which I am not privy to and I don't feel confident to testify as to our agreement with CETA, there is

a possibility those lines will be lost because other City agencies are looking for lines under a CETA grant, too.

THE COURT: I am confused now. The 205 people when the grant is run out under temporary jobs, I understood they are being hired by permanent appointment because the City has found funds?

THE WITNESS: That is right.

THE COURT: That has nothing to do with CETA?

THE WITNESS: No.

THE COURT: That is the first thing we are trying to find out. We are trying to find out why on March 31st there will be a loss of funds for the City.

THE WITNESS: It relates to CETA in that the agreement with CETA requires us to go in seniority order from a preferred list. If these 205 people are in effect not picked up, they would be the most senior people and they would have to be considered for CETA positions first.

Q How does one lose money in that situation from the federal government?

A Because in fact these people are not qualified for CETA because they have been employed.

Q The members of our class?

A The 205 people under the federal grant.

Q The CETA hirings are on April 1st?

A The remainder of the 250 will be hired on April 1st, yes, sir.

Q Are those permanent or provisional or does it matter from Ceta's point of view?

A There are funds allocated at the moment until only July 31st under the CETA grant.

Q CETA does not care whether they are provisional or permanent?

A They are provisionals, provisional appointments under CETA, yes.

Q If members of our class were appointed with CETA funds, would that not preserve the funds from the City point of view?

A Yes.

Q Could those not be permanent appointments just like the ones on March 31st?

A I don't understand that question.

Q Assuming the members of our class are entitled to permanent appointments, why could they not be appointed in lieu of the people on April 1st, the CETA hirings?

A They could be.

Q Why could not there be a package deal embracing the two dates without any loss of funds?

A First of all, they have not been processed through

CETA. We don't know if they qualify for CETA and we don't know who they even are yet. The CETA group-- it's been a process of sampling the list or going through the list to call people in and offer them the positions and processing them to see if they quality.

It requires going through somewhere in excess of 800 names or the top 800 names on the list.

Q As I understand it, the only risk of loss of federal funds then is the loss of the CETA funds with respect to the 40 people or some of them if they should get in some sense taken off that list because of the hirings of the members of our class and the lowering of 205, is that the idea, into the CETA categories?

A Presumaly there would be some bumping back process. Exactly how it affects CETA grants I am not competent to testify. I don't know.

Q I confess I am at sea on the situation. I don't see offhand why it isn't appropriate to go ahead and deal with the March 31st date and come up with an appropriate list of those people which does not seem to have any direct impact on funding and go forward on that basis and let the April 1st date take care of itself.

THE COURT: What crosses my mind, Lt. Brennan, is that if the people in this class, as you state, might be

eligible for appointment under the CETA funds, and that is apparently what we are concerned about, I don't understand why you didn't and some people in the department were not working on verifying that list that the plaintiffs were attempting to produce Wednesday, Thursday, Friday and Saturday.

I don't understand that.

THE WITNESS: With respect to what?

THE COURT: With respect to seeing whether they are eligible for appointments and with CETA funds.

Now I gather that the list is made and you are going to have to go through the process now and you are closer to March 31st. I don't understand why you were not doing that last week.

THE WITNESS: We didn't know who they were.

THE COURT: They were working on them and they had been getting the list up.

THE WITNESS: The list was given to us today.

THE COURT: But you could have been there working with them and gotten the lists involved.

MR. CROWLEY: The first draft was available Tuesday.

THE COURT: Something was available Tuesday that you have been going through.

THE WITNESS: In fact, members of the plaintiff class are included in the CETA group but we don't know exactly what the order would be on the list and members of the plaintiff class are included in all of the groups.

MR. CROWLEY: There is a whole area, a question of what kinds of issues the defendants are going to insist have to be reviewed from the personnel folders,and I don't know if you want to go into that at this point.

THE COURT: It seems the things the lieutenant is raising now, I guess it is nobody's fault, because I misunderstood.

I was under the impression and I clearly got the impression that March 31st was critical in terms of loss of federal funds for the City. Maybe I got that impression incorrectly.

Now I find it isn't. Apparently I was in error.

I just don't understand why there is the insistence that this class had to wait for some procedure until things are straightened out rather than the members of the class to be considered for appointment.

I find that harder and harder to accept.

MR. CROWLEY: I don't know if you want to go into, on a testimonial basis, the issues which the City intends to raise to challenge the people of the list that we

prepared. If we are going to have that problem, we would like to suggest at the outset that there is no need to have such a review for reasons that we can put before the Court.

THE COURT: I have no idea. There are people here and I suppose Ms. Carroll is going to go into this or whatever she will go into.

Thank you.

MS. CARROLL: I have a few questions.

THE COURT: Are you through?

MR. CROWLEY: Yes.

REDIRECT EXAMINATION

BY MS. CARROLL:

Q When you spoke of loss of money to the City, Lieutenant, were you in fact referring to the CETA hirings of March 18, 1977?

A Yes.

Q Can you explain that vis-a-vis the hiring of the 25 women under the Acha case?

THE COURT: We were not talking about any March 18 business of loss of money. The point was that was brought up to me and I got the Commissioner's affidavit that was followed, the same thing as July, and indicated over the phone that there was no necessity for issuing an order and

he could follow the same procedure.

What does that have to do with it?

THE WITNESS: The positions were not filled on March 17 when the CETA funds are available on March 17.

There is no guarantee that the CETA funds would remain available--

THE COURT: I understand that. But we are talking about what was represented to me on March 21 and 22 and 23 and today. That date has passed already.

I thought that you were representing something to me about something that was going to happen on the 31st.

THE WITNESS: The remainder of the CETA positions have to be filled now while the CETA grant is still available. I don't know how long the CETA grant will be available if we do not fill those positions now because the CETA funds have to be used.

THE COURT: You have to fill all the positions? I thought the Commissioner hired some 200 people--

THE WITNESS: 210 out of the allotted 250. There were 250 positions to be filled and 210 were hired on March 17.

THE COURT: We are talking now of 40 people?

THE WITNESS: 40 positions, right.

THE COURT: 40 people?

Q:mg 16 Brennan-redirect

THE WITNESS: 40 positions.

THE COURT: And you have indicated to me that those are supposed to be filled on April 1st, is that right?

THE WITNESS: Yes, that is the second portion of the CETA schedule.

THE COURT: We went into that in the other case and we went into that this morning. I can't learn anything more than that.

MS. CARROLL: Excuse me?

THE COURT: Lt. Brennan told me about that and about the 40 and those positions and about the 25 women that have permanent appointments in the other case. He told us that this morning.

Q Lt. Brennan, can you tell us why the members of the plaintiffs' class have to be retrained before they could serve as policemen and what period of retraining is involved?

A All of the CETA hirings or the people hired under the CETA program are being put under a two-week training course at the Police Academy. Presumably the plaintiffs would also have to go through a two-week training course.

Q Are members of the plaintiffs' class included in the hire schedule for the 31st as well as for the 1st?

A By definition there are members of the plaintiff class in all the hires to date, yes.

Q With respect to any process of bumping any of the 205 persons on duty by use of a list of minority plaintiffs from the preferred list, would the department have to compute the relative seniority of all other persons on staff, that is, the 205, to make a definitive decision as to adjusted seniority date?

MR. CROWLEY: I object to the form of this and suggest that we have Ms. Carroll testify, your Honor.

THE COURT: Objection sustained.

Q What review would have to be done of the seniority status of the 205 on staff vis-a-vis the 94 on the preferred list?

A Well, my understanding would be that if a person is on the preferred list by virtue of his score on an examination, and that is how he acquired his seniority because he was appointed earlier because he has had a higher score, and if the plaintiff is given the relief suggested by the plaintiffs' counsel here and given the benefit of a median appointed date from an examination held earlier than the person with the high score that person would be -- he would be bumped or he would be exceeded by that person who had taken the prior examination.

What I don't understand is whether that person was a minority or nonminority, my first understanding was that it would depend on what his score was. If he was over the median score he would be reduced in level based on the person who took the earlier examination.

Q Would there be any recomputation of the 205 on staff based on veteran status?

A There is the possibility that we would have to review all of the people to see if they in fact used their veteran status initially.

Q And if they did not?

A There would at least be some discussion as to whether they should be afforded an opportunity now to go back and use their veteran status.

Q What does veteran status entitle an eligible to in terms of computation?

THE COURT: Isn't it in the law?

MS. CARROLL: I thought you said you were going to give a decision this afternoon.

THE COURT: Yes.

MS. CARROLL: In terms of looking up the law on this, I think it would be simpler.

THE COURT: All right.

A A veteran -- a disabled veteran would have the

opportunity to add 10 points to his test score. A nondisabled veteran, an ordinary veteran, would have the opportunity to add 5 points to his score.

If in fact on the date that the person is scheduled for appointment they would not need that extra 5 points or that extra 10 points, they can reserve it and waive their veteran preference and use it at a later date on promotion examinations.

Q Lt. Brennan, on what date did you first receive the draft of the plaintiffs' statement of persons, minority persons, on the preferred list?

THE COURT: We went through that this morning. What is the point of thrashing that out any more? He testified to that early this morning. You got it on Tuesday or Monday night.

MS. CARROLL: There was some implication on the cross regarding the earlier alpha list and I wanted to make certain.

THE COURT: I understand that Lt. Brennan got that list that was given to him either Monday night or Tuesday morning and he went over it.

Is that correct?

THE WITNESS: I received it some time Tuesday and Tuesday night and Wednesday morning I went over it.

THE COURT: He told us about that this morning.

Q Did you in fact complete the process that you had worked on at that time of reviewing that list as against the PA15s?

A No, I did not.

Q How many names remain on that initial list to be cross-referenced?

A As I stated before, there were about seven or eight personnel folders that were not readily available and I say in addition to that, there were maybe ten or twelve people that I had not reached, I had-- I have the folders but I haven't done the review yet.

THE COURT: I thought there were only seven but now there are nineteen?

THE WITNESS: I have folders for ten or twelve that I have not reviewed.

THE COURT: But you have reviewed those lists?

THE WITNESS: Yes.

THE COURT: You did not have folders for seven but you thought they would be available because people were searching for them, at least that is what you said this morning?

THE WITNESS: Right.

Q And regarding the other list that was received

this morning, have you taken any steps with respect to certifying that against the PA15s?

A I haven't even compared that with my list. I noticed there are similar names but I haven't compared them with the list that I did review.

MS. CARROLL: I have no further questions.

RECROSS-EXAMINATION

BY MR. CROWLEY:

This decision came down March 17. You have referred to various conferences you have had with counsel and with the Commissioner of Police or his representatives and so on, and you talked about reviewing various problems such as the PA15 problem, whether people are eligible at a certain time, the impact on other lists.

Have you had any conferences at which any effort was devoted to try to come up with some affirmative program to correspond with the March 17 decision in this matter?

A Yes.

Q What approaches were considered in those sessions?

A It was considered that we should take a little time to review all of the possibilities, first of all, with respect to theories of recovery because we did not have any

theories yet --

Q Do you yet?

MS. CARROLL: May the witness be permitted to complete his answer to the question?

A -- and it was not that if there was a list proposed and established, which we could agree to or even we could not agree to; if it was proposed by you that we do a review in an orderly fashion where we could set up people who are familiar with the file and review the cases, people who actually worked on applicant investigations and people who knew what to look for in the folder rather than have me look through every folder. --

We would set up a panel and review all cases and have the plaintiffs' refuted objections we had sustained and if there was necessity then we would have hearings on those who were left over.

Q You recall we had a session where you and I were both present about a week ago today where we asked if you had one an off-the-record basis any other proposals rather than taking more time to review the PA15s and various other problems; hae you since that time come up with any other approaches and other than taking more time?

A It was the orderly review process, yes.

Q You had some rough idea of what the lists that

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we were going to come up with woud look like when it was finally prepared. You knew how it was going to be put together.

Is that correct?

A I had some idea, yes. I had some idea as to your theory of relief. I didn't know what the list would look like.

Q And you had problems in mind that may arise given the PA15?

A Problems that may arise, yes.

Q Is there any affirmative approach that you want to put before the Court this afternoon, putting to one side the problems that the PA15s might raise as to how to come up with a fair appointment taking into account the March 17 decision in this case?

A Given more time we can come up with a different approach.

MR. CROWLEY: No further questions.

THE COURT: Thank you.

(Witness excused)

THE COURT: Do you have any other witnesses?

MS. CARROLL: Yes, I would like to call Deputy Inspector McNulty.

MICHAEL JOHN McNULTY, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. CARROLL:

Q Would you describe your present employment?

A Deputy Inspector with the Police Department, serving in the Personnel Bureau as Executive Aide to the Chief of Personnel.

Q Would you describe the duties of your position generally, please, for the Court?

A In addition to serving as his executive aide, which amounts to advising him on matters related to the operation of the Personnel Bureau, I command a small section which is in charge primarily of planning and personnel programs and resolving personnel problems.

My duties consist primarily, in addition to the planning function, advising the Chief of Personnel on matters related to personnel services: training, employment, terminations and the like, promotions, career development and so forth.

Q In addition to passing an examination for the Police Department or police officer, has the department had a consistent policy with respect to the satisfaction

of basic prerequisite eligibility requirements for the job of police officer?

MR. CROWLEY: Objection as to form.

THE COURT: Sustained.

Please, if there is an objection, withhold your answer until I have ruled.

THE WITNESS: Yes, sir.

Q What is the position of the Police Department with respect to the certifying of eligible candidates in addition to the passing of an entry level exam?

A It is certainly the position of the department to accord with the state law and the rules promulgated by the Department of Personnel. Also the specifications set forth in the job announcement and this department, our department, conducts the background investigation for the Department of Personnel to determine that in fact all of the requisites have been met.

THE COURT: Would you do that in any event before you hired anyone?

THE WITNESS: That is correct.

THE COURT: What you are saying is that your procedure is that if a man passed an examination or whatever the prerequisites, there are other things that you have to look at and you do that investigation before he is hired?

THE WITNESS: Correct.

THE COURT: You are not doing anything differently now than before?

THE WITNESS: No.

Q Does the Police Department hire persons prior to completion of the investigation of officer candidate qualifications in any circumstance?

MR.CROWLEY: Objection, your Honor, same objection.

THE COURT: Since I think that the answer is almost obvious, maybe it isn't--

MR. CROWLEY: I concede it is obvious.

THE COURT: The answer seems to be obvious. Maybe it isn't. I will hear it.

A It is certainly department practice not to hire unless we are satisfied that the individual meets all the criteria.

Q With respect to the March 31, 1977 hiring, can you indicate to the Court the impact of a reordering of the preferred list which would involve the removal of persons on staff in favor of a listing of plaintiffs who have established that they have taken earlier exams but as to whom there is no proof of satisfaction of these eligibility prerequisites?

MR. CROWLEY: I object on the grounds of lack of clarity. I don't know what the words "on staff" mean.

If that refers to people who have signed waivers in this litigation or people not permanently appointed, I think the record ought to be clear on that.

THE COURT: I assume that the understanding she is talking about, 205 people who were hired on March 31, 1976 pursuant to a grant that expires on March 31, 1977, and those people, as far as I understand it, have not signed any waivers.

If that is what the situation is--

MR. CROWLEY: I take it there are also provisionals whose seniority may be lower than the seniority of people in our class.

THE COURT: In any event, the point is that I think those are the people she is talking about.

If she is not talking about those, then I would want a clarification on the assumption that those are the people you are talking about that are regarded as being on staff.

MR. CROWLEY: I gather they did sign waivers in Acha.

MS. CARROLL: I wonder if counsel might be directed to permit me to ask the questions and make an

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objection --

THE COURT: Counsel had made the objection and I had thought that I was trying to rule on the objection and I was trying to clarify as to what I thought the question was.

If I am wrong I will have to sustain the objection.

But with that understanding of what it is you may proceed.

A If I understood the question, it was my opinion of the impact upon the department should members of plaintiffs' class be afforded some sort of relief which might in effect bump people out of the existing role.

(continued on next page)

THE COURT: Not bump people, bump 205 provisionals whose grants are out on March 31st. That is what we are talking about.

THE WITNESS: Is my understanding correct?

MS. CARROLL: Yes.

A I think it is common knowledge that the department has been subjected to a number of very difficult personnel situations in the past year and a half not the least of which has been the very traumatic suspension of some 2800 people because of the fiscal crisis.

During that period, of course, since the layoffs which apparently had a tremendous effect on all members of the Police Department because one of the predicates of police service or at least a career in the Police Department was that it was a secure job, one which a personcould assume once he had satisfied all the criteria and was hired would allow him to continue his service for some 20 odd years when he could retire with a pension.

But because of the layoffs and the creation of the preferred list coupling that with the complications visited upon the department by rulings in Acha as well as the certificaton of the preferred list to the Department of Correction for filling some vacant positions over there and the requirements imposed by CETA all of these matters

have generated a great sense of insecurity and uncertainty in the ranks of police officers and I think that that could probably be borne out in a variety of ways.

We have had public pronouncements by the Police Commissioner himself, the Patrolmens Benevolent Association has denounced the situation in which many members of the department have been cast. In addition to that, from my own experience and knowledge in dealing with people who are running programs that I supervise --

THE COURT: Inspector, I don't think you are really answering the question. You are answering a question I think that seems to me relates to the impact of some of these decisions but I thought the question was more specifically as to what was the impact on 205 people if you were ordered to hire members of plaintiffs' class. That is what I thought the question is, not a general impact onto what a decision such as this or Acha might have on the matters, what effect it might have.

THE WITNESS: If it please your Honor, I would assume that the people in the group of 205, some of them would be very directly affected. They may wind up without jobs. I thought the question was broader than that. I thought it was addressed to the entire department

and the effect or the impact that some form of reordering would have upon the department at learge and that is the answer that I was proposing.

Q That was addressed to my question. I didn't mean specifically the 205. I would like a statement. My question directs itself more specifically to the impact on the department as a whole from this.

THE COURT: What impact?

MS. CARROLL: That is the question.

THE COURT: What are you talking about? The inspector was talking about the merits of the decision. Is that what you asked? That is what he answered.

MS. CARROLL: That is not a fair characterization of his testimony.

THE COURT: Ask him the question again. I want no more statements from you. Just ask your questions. Clarify your question with regard to it. I restated the question that it related to 205 because I thought that is what the question related to and there was nothing said by you in regard to it but, in any event, if that is the answer to the question, fine.

Are you through?

THE WITNESS: Yes, sir.

Q With respect to specifically the hiring of

the 205 positions that are scheduled for permanent lines on March 31st, 1977, what specific personnel impact will occur if the 94 persons on the plaintiffs' list are ordered to be given greater seniority? Where will the 205 persons on the staff go? Would their positions devolve anywhere else?

MR.CROWLEY: There are more than 95 on the list, your Honor.

MS. CARROLL: You may answer the question.

MR. CROWLEY: I object because the predicate is wrong. There are some 200 people on our list and not 95. His answer might be quite different.

THE COURT Whatever the number is.

All right.

A Well, since those are lines for which tax funds will be utilized, in effect they are permanent lines, the departmentwould be required, of course, to follow the dictates of State Civil Service law and in effect push people out of those positions who may be in them now.

They may drop down into other funded positions. In some respects I suppose people would be completely out of a position, they would be dropped from the rolls of the department.

Q Are you familiar with the LEAA funding that

has provided temporary employment for police officers in the department?

A Yes. Are you referring specifically to the so-called ACEgrant?

Q Yes.

A Okay.

Q Would the bumping that you have described impact on that group of hires?

A Yes. ACE is an acronym for the Anti-Crime Experiment. There were 60 persons hired in preferred list order but as a result of one of Judge Duffy's rulings there are 32 people in that group who would not be immediately affected but the remaining 28 would, that is my understanding. Those people ostensibly would be bumped if members of plaintiffs' class received superior seniority rights.

Q Do you know whether or not any of those 28 persons thatwouldbe in line for bumping among the ACE group are in fact members of the plaintiffs' class?

A I don't know for a fact.

Q That ACE grant, do you know when that is scheduled to expire?

A Yes, on or about August 13th, I believe, '77.

Q Do you have any information at this time as to

whether or not there is any further moneys available to the Police Department other than the tax levy funds available for the March 31, 1977 hiring and the CETA funding for the 40 hires on April 1, 1977?

A None to my knowledge.

Q Were you privy to discussions had with respect to the hiring of police officers in March 1976, the provisional hires?

A Was I privy to discussions?

Q Yes.

A To the extent that I was familiar witht he funding application and the construct of the funding application. I had some discussions with the chief of personnel at that time and with other members of the department who had actually drafted the requests for funds and we made some decisions about how the funding application would be artfully drafted to convince the law enforcement assistance Administration at that time, which was administering the Departmentof Commerce funds, the way in which those moneys could be put in good use. Thatwe could demonstrate some tangible result in bringing back 205 people to the department who in effect would displace another 205 into one of six special law enforcement details and then we could measure the results.

Q What public notification, if any, was given of these hires in March 1976? Were their press releases or anything of that kind?

A I don't recall. I would suspect there were public announcements. I don't recall specifically whether there was a press release or interviews with members of the department. I have no direct recollection.

Q With respect to hires is there a general practice followed by the department with respect to making notification of such hires available to the pu b-lic?

THE COURT: That really adds nothing to this case.

MS. CARROLL: It does --

THE COURT: No, it does not. It has nothing to do with the issue you say you want put before me. It has something to do with some other issue that you have in mind. I don't want to hear any more testimony about that.

Q At the time of the hires in March 1976 were you aware of the fact at that time that this litigation in question -- there was no litigation by the Guardians Association at that time?

THE COURT: I don't understand what that has to

do with this case. We are talking about, I thought, what the impact of a projected order in this court that would have or might have in regard to matters on March 31, 1977.

MS. CARROLL: On cross examination of Lieutenant Brenna counsel for the plaintiff raised the point that in making these hires we did not consider the impact of litigation. I would like to elicit from the witness that, in fact, this litigation was not in existence at the time of the hires and it is a critical fact.

THE COURT: The plaintiff specifically asked the question in regard to did they have any consideration before the litigation was filed. That is the question you asked Mr. Brennan. I don't see where this has anything to do with it.

MS. CARROLL: I don't understand. It is relevant if it is aske of Lieutenant Brennan but no longer relevant if I ask Lieutenant McNulty?

THE COURT: In any event, the question has no relevance to the issues of this case. You can characterize it any way you see fit.

Q From your experience in personnel work with the Police Department can you indicate to us what kind of screening of the preferred list, in your opinion, would be appropriate -- I mean a minority preferred list -- would

be appropriate for selection of officers for any hiring by the Police Department?

A We would certainly fingerprint the individuals involved. We would inquire as to the nature of their activities from the time of their termination as permanent members of the department to the present and we would conduct --

THE COURT: You mean fingerprint them?

THE WITNESS: Yes.

THE COURT: You would have to fingerprint them again?

THE WITNESS: Yes, and send those prints to the Federal Bureau of Investigation by way of the State Division of Criminal Justice Service so that a state check would be conducted as well as federal.

THE COURT: You have had fingerprints on file but you do it again?

THE WITNESS: That is correct, sir.

We would certainly inquire into their activities during that period of time and do a quick check at least to determine to some extent that their statements of activity during that period could be verified.

Q Would you require any questionnaire to be compiled?

A Yes, but a very limited one. Certainly not to the extent that the so-called PA 15 would make inquiry.

Q Is there any physical examination?

A Yes, there is also a medical examination, not a physical examination in the sense that we don't require the individuals to carry on physical tests like the entrance examination. But there would be a medical examination to insure that the individual was medically fit for restoration to the department.

Q With respect to the 205 hired under the grant what period of notice was given them prior to the commencement date of their service and what occurred in that interim period?

THE COURT: What is the purpose of that?

MS. CARROLL: We are talking about whether or not we can meet a March 31st date of reordering and it is critical as to whether or not these things can be done.

THE COURT: Let's deal with the March 18th people. Is that the group you are talking about?

MS. CARROLL: I had asked him about the March 31, 1976 people.

THE COURT: What about the more current people,

the March 18th people?

THE WITNESS: The CETA group?

THE COURT: Yes.

Howmuch time do you allow?

THE WITNESS: We allow ten days for a mail response. We sent out letters to the individuals in preferred list order and allowed at least ten days for dates on which they would have to appear for initial processing, that is the application stage. Then at the application stage when they filled out the next forms there would be subsequent inquiri-s to determine whether in fact they did satisfy the CETA regulations, the residency requirement, the unemployment requisite and the like. On top of that they had to be scheduled for medical examinations as well as providing us some time to verify their activities while they were not with us.

THE COURT: What was the some time?

THE WITNESS: I would say close to six weeks.

THE COURT: Six weeks to process the application?

THE WITNESS: Yes.

Q Can you te-l us what would be involvedin a review of the PA 15 or personnel folder in terms of reconstructing a constructive seniority date for persons

listed, for example, in the plaintiff's preferred list of minority eligibles?

A Well, I think the review of the PA 15 would have to be conducted to determine that the individual in question satisifed employment requisites on the particular day which might be proposed as a date for grant of retroactive seniority. That is that the age requirement was satisfied, whatever other requirements we have, the high school diploma or the high school equivalency, the driver's license and so forth.

Q And where would that review be done?

A Where physically?

Q Yes.

A It would be done within the Police Department. The applicant investigation unit, which is one of the sub units of the personnel bureau would do that. They are physically located at the Police Academy building.

Q The persons who are on staff, that is the 205 who are on staff by virtue of a provisional grant, have they received any notification regarding the extension of their continued employment beyond the 31st of March, to your knowledge?

A Yes. To my knowledge they have not received any normal notification from us but however there have

been press accounts to that effect.

Q Regarding the plaintiff's proposal in this case, which is a reordering of the preferred list based on the certifying or certification of the fact that a minority person took an earlier exam and failed that exam, and by earlier I mean earlier than the exam for which he actually or she actually received the appointment, and applying that adjusted seniority date to determine the right to employment, under civil service law or under general practice of the Police Department assuming that such adjusted seniority dates were calculated what steps would the department take vis-a-vis those on the staff concerning their continued employment? What would the notification process involve?

MR. CROWLEY: I object if Mr. McNulty is asked for a conclusion of law which he is, in fact. As to police practice, that is appropriate.

MS. CARROLL: I will limit my question to police practice.

A What steps we would take?

Q Yes.

A I am not quite sure that I understand the question.

Can I ask that it be rephrased?

Q Sure.

Given the plaintiff's plan for restructuring that has been indicated, that is the ordering of the preferred list as indicated, what steps would the department take to effect the 205 and in what process or in what order would that actually be taken?

A Well, if I understand you, those persons who might be awarded some grant of retroactive seniority we would of course initiate, as I indicated earlier, a review of their PA 15s to verify in fact that they did satisfy certain minimum requirements that were required at the date upon which they normally would have been appointed. In addition to that we wouldhave to slot them in. There would have to be some restructuring of the preferred list. We would have to slot them in at some appropriate point in the list.

Q In implementing these steps would the department take into account the racial status of the person who is among the 205 to be so bumped?

A No. You are talking about the ethnicity of the individual?

Q Yes.

A No.

Q Based on your experience in the department

in your personnel work could you indicate to us your best estimate as to the time necessarily involved in a reordering of the preferred list which included in the examination of requirements and the satisfaction of medical and other qualifications you referred to if the number of persons involved was approximately 90 odd persons?

A As I indicated for the CETA hires I think we were contemplating at least six weeks worth of lead time. I would have to venture a guess that we would require at least a month for a smaller group.

Of course they would not have to satisfy the same requirements as the CETA hires but I would think that a month would be sufficient time to do the forms of checking and verification that would have to be done.

Q With respect to the 205 on staff what notice if any would be provided to them?

THE COURT: Notice about what?

MS. CARROLL: Of the potential for reordering.

A I think it would be rather short notice. I think -- I don't know that we would necessarily provide formal notice to each member of the list until we determined that that person might actually be affected. If that person were in fact affected and wound up with a lower list number, of course, then we would notice them formally.

There is no doubt in my mind that within a short period of time once that process was initiated that those people on the preferred list would learn about it, certainly the 205. They would learn about it very, very quickly.

Q Are you aware of any requirements under the CETA requirements with respect to the utilization of the preferred list for purposes of making hires?

A Yes, the Department of Labor has directed that we do employ the preferred list for the CETA hires. That accords with state law. The moneys are there to hire and theoretically we could hire at will but since they are provisional appointments the Department of Labor has required us to use the preferred list for that purpose.

Q Is there any method by which such a requirement could be waived by the Police Department?

A Not to my knowledge. Not only that, I think it would conflict with policy or contravene policy established that in all hirings since the layoff that we would utilize the preferred list in preferred list order.

MS. CARROLL: I have no further questions.

CROSS EXAMINATION

BY MR. CROWLEY:

Q Me. McNulty, you may have said this at the beginning. How long have you been in the department?

A Since November 1, 1955.

Q How long have you been in this particular job, executive aide?

A I have been with the personnel bureau since July 1973 and I have been in the capacity, the actual capacity as executive aide for some several months now but have been acting as an advisor and a trouble shooter of sorts for the chief of personnel since his appointment in February 1974.

Q So you have been working closely with him going back to '74?

A That is correct.

Q And involved in personnel work one way or another going back to '73?

A Yes.

Q I take it you are being offered as an expert in that area, an expert on police personnel work by the personnel working in the New York City Police Department, is that correct?

MS. CARROLL: Your Honor, I believe the witness testified as to factual matters. I didn't specifically offer him as an expert of personnel.

THE COURT: You posed an expert question to him.

MR. CROWLEY: I assumed from the form of the

questions that he was offered as an expert since he answered as an expert and I would like to ask for his opinions, too.

THE COURT: The questions phrased to him were phrased to him as an expert. You can ask opinions of non-experts in this case.

MS. CARROLL: I would limit the expertise to specifically the matter of police personnel matters. I believe that was the foundation that was laid.

Q You regard yourself as an expert in that area, police personnel matters?

A Why not.

Q You mentioned you worked a lot and closely with the chief of personnel?

A Correct.

Q I take it that he has been concerned with minority recruitment matters to some extent for the past few years?

A He has.

Q And you have too?

A Absolutely.

Q Is that an area of great concern or has it been in the Police Department, your section, in the last few years?

A Yes.

Q Have you taken any affirmative actions in that

area?

A I directed the minority recruitment program and campaign for the department in 1973.

Q A major affirmative action program?

A Correct.

Q I made some notes and I would like to go at it backwards.

You talked about the CETA list and some agreement with the Department of Labor that you use the preferred list, right? I don't suppose that you can predict what the Department of Labor's position would be if you used the preferred list as it was directed to be reordered by this court, would you? Do you have a view on that subject?

A I don't know except that it is my understanding that the Departmentof Labor if we use the preferred list for subsequent CETA hirings that in effect bumped people out of CETA positions that the Department of Labor would be extremely adverse to backfilling those positions. In other words, the grant, the CETA grant or the CETA funds were conditioned upon utilizing the preferred list and not bumping people out of those positions once they had been filed.

Q When you talk about the Department of Labor

people, were you involved in those negotiations?

A To a limited extent.

Q As far as you know when you talked about using a preferred list did anybody talk about the impact of this or other litigation?

A No, I don't believe so.

Q It is possible they might regard the reorder by this court as a preferred list within the agreement?

A I think that in the negotiations with the CETA people that they were talking about the existing preferred list.

THE COURT: Am I to understand by that that by your understanding this could mean that the members of this class, no matter what their seniority in terms of CETA, would not be entitled to any benefits whatever, is that what you understand?

THE WITNESS: I don't know if that is exactly the case.

THE COURT: Close to it?

THE WITNESS: It might well be that we would not be able to backfill CETA positions.

THE COURT: All right.

Q But this subject was not raised with anybody in the Department of Labor, is that correct?

A The impact of a reordered preferred list?

Q Yes, or the possibility of hiring minorities pursuant to Court order in this litigation?

A I don't think tht specific point has been raised.

Q Has the whole subject matter been raised, the impact of this litigation and the hiring of minorities?

A Not in my discussions with the people, no.

Q Tell us a little about CETA. What was the theory of that grant? What are the CETA people supposed to be? If I can lead, as I understand it it is supposed to get at the hard core unemployed and getting them to work?

A If you understand the Congressional intent it was designed to resolve unemployment problems in so-called hard-core unemployment areas. That is why when the regulations were framed by the Department of Labor they dictated an unemployment criterion be met as well a residency requirement. Theoretically the thrust of the funds are to get at unemployment in the New York City area, within the confines of the five boroughs. And also to rehire people who were unemployed.

Q Was there any emphasis, either in the CETA program from a federal point of view or in your approach as you implement it, in trying to hire minorities or emphasize minorities in your rehiring efforts with those

CETA funds?

A No. There was no intent in the utilization of those CETA funds to specifically take affirmative steps to hire minorities with those CETA funds. The requirement was that we utilize the preferred list as we had been doing or had done with the other two grants.

t3b

jqjb 1 McNulty - cross

Q I take it that one reason it took six weeks to go through the CETA people was that you had to screen them to make sure that candidates had in fact been laid off for some period of time?

A Yes, they had to satisfy the unemployment criteria as well as the residency.

Q Two situations which would not apply in our case, is that right?

A I don't know --

Q The requirements for rehiring for our list even by your account would not include a residency requirement nor would it require an unemployment requirement, is that correct?

A Not if members of your class were being hired with permanent funds. If, however, they were being hired, as assuming we could backfill CETA's positions, they too would have to satisfy the residency and unemployment.

Q Only if we used CETA funds?

A Yes.

Q It would not be a requirement of this court order that they would have to be residents or unemployed at any particular time?

A No, but merely to satisfy the CETA requirements I think those two requisites would have to be met.

Q Assuming you were not satisfying the CETA requirements, couldn't this be done more rapidly than the hiring for CETA?

A That six weeks envisioned two weeks of checking the residency requirement as well as the unemployment requirement. The other months was allotted for the mailing of letters, the fingerprinting, the necessary background check and the like. When I say that I think in the case of members of the plaintiff's class being appointed, I would allow at least a month for the necessary processing.

Q Why would you fingerprint them again?

A Well, to insure that this is the person we are talking about. For example, if John Jones steps forward and he says that he was appointed back in a certain period of time and laid off and now he has received a notice to come forward, we don't know that he in fact is John Jones so we fingerprint him to make sure.

Q You send the fingerprints to the state and Washington just to make sure they know he is John Jones?

A Yes, and also to determine whether or not the individual has some criminal record that might have been generated in that particular period of time, the period of layoff.

Q Has any consideration been given to the

possibility of hiring people subject to finding out that they generated a criminal record in the meantime?

A That is not our policy, no.

Q It is not your policy?

A No.

Q As to their activities since termination, you do some sort of investigation again to make sure they haven't done criminal acts in the meantime?

A Correct.

Q And the questionnaire is aimed at the same issue, improprieties since layoff?

A Correct.

Q While they have been unemployed?

A Yes.

Q Again, there has been no consideration of the possibility of hiring people subject to whatever findings you make?

A No.

Q Could that be done as a practical matter?

A If the court so ordered, but it's not the Police Department's policy. If I might add, if you permit me, those persons who are currently on the preferred list for whom improprieties are alleged, we are moving under a section of the Civil Service Law to have their names stricken from

the list.

Q But that can be done after hiring if it were so ordered by the court?

A After hiring, yes. It could be done after hiring but in a different forum. We cannot arbitrarily remove people from the preferred list but only where we determine that they might be physically disqualified or have effected certain misconduct which would disqualify them for reappointment. We can move affirmatively before their possible appointment --

Q They have certain vested rights and it's harder to remove them, is that it?

A That's correct. We cannot arbitrarily strike people from the preferred list.

Q I presume you wouldn't arbitrarily strike them anyway, would you?

MS. CARROLL: Would the witness be permitted to complete the answer to the question.

THE COURT: I didn't think that Mr. Crowley was interrupting. I thought they were having a dialogue.

Q I assume you would not arbitrarily strike anybody from any list?

A We have no authority to do so.

THE COURT: If at any time you have not finished

an answer and you are interrupted, please let me know and I will let you complete your answer.

Q We have used waivers for various purposes in this litigation. I suppose one could have a waiver with respect to a possibility of dismissal if something came out from fingerprints and so on after the appointment, isn't that right?

MS. CARROLL: Objection. There have been no waivers in this case. All there have been are statements of acknowledgment. No one has waived any rights. They have just stated that their rights to employment may be subject to the rights of the plaintiffs in this class.

THE COURT: All right.

Q Could one not use waivers in this situation to solve this problem to get people on the job?

A I think not. What you seem to be proposing to me is that we would rehire a person subject to the discovery of misconduct while they were terminated. I don't think the department would want to adopt that policy.

Q The department is going to do certain things it doesn't have to do. Wouldn't that be a practical solution to the problem, to avoid the six-week delay? Couldn't we have an eight-week period during which the formal procedures would not have to be followed?

A We could hire people overnight and say you are rehired subject to a full or even a cursory examination of your background but we may well then have enrolled or we may have vested people with the authority of a police officer, armed them with a sidearm and put them through a ten-day training program and find out that they are wanted in some other state for a criminal offense.

I think we have gone through a lot of waste and bother and we have subjected the citizenry to an individual who should not be hired. It's not the department's policy to allow that or condone that. We want to be relatively sure that the individual had not engaged in misconduct while not in our employ and we would not want to rehire them subject to a discovery of that misconduct.

THE COURT: Let me ask a question for clarification.

The situation you were talking about where a person would be fit to carry a firearm, some of these people have gone through that, haven't they?

THE WITNESS: I assume they all have if they are on the preferred list.

THE COURT: They have gone through that kind of thing. All you would really be concerned about is whether they had any misconduct or any aberration while they were

gone.

THE WITNESS: As well as any medical malfuncti that might have occurred in that period.

THE COURT: A medical malfunction is an exami tion by some doctor who tells him he is okay medically.

THE WITNESS: The point being made by counsel that we would rehire them subject to that kind of examina tion and determine the fellow is not actually fit to per form full policy duty.

THE COURT: I was thinking about your answer terms that they were not a danger and so forth. I thoug you were talking about a psychological profile and thing like that which I thought you did the first time.

THE WITNESS: That's done at the initial hiri but the point is that these people have not been in our employ for some 18 months and we want to be fairly certa that we are not rehiring a person who should not be re- hired and one who may have been engaged in all kinds of misconduct during that period. I don't think it would b right, fair or just to the citizenry or the department t rearm those folks.

Q Let me follow up on that point. At the outse you said to be a policeman you have to go through the examination and then go through the PA-15 to see that al

the requirements have been met. With respect to these men in our class all the requirements have indeed been met?

A They were met at the time of appointment.

Q These are former policemen?

A Correct.

Q And through no fault of their own have been laid off?

A Correct.

Q And 35 per cent of minority?

A Yes.

Q And the makeup of the police are roughly 10 per cent minority overall?

A I think it's higher than that. If we are talking about minorities, black and Hispanic, yes, 10 to 11 per cent.

Q You talk about the impropriety, the unfairness to the people and so on of taking these people back who have been on layoff through no fault of their own.

Isn't there some procedure that you can work out for this interim period while you run through the checks that would take adequate provision for their having had a deterioriation of character?

A I am suggesting that even to take back one person who may have committed some serious criminal offense in the

last 18 months is unfair to the citizenry and I think it's unfair to the department. We shouldn't be rearming people and providing them with the inherent authority of a police officer when they may have been engaged in gross misconduct in the last few months.

Q How long would it take you to run a fingerprint check on me to see what I did in the last 18 months? Suppose you couldn't hold some fellow very long, could it be done overnight, if I were a wanted man?

A It could be done. If we got the appropriate cooperation both from the State and the Federal Government.

Q If we got the appropriate cooperation could that be done overnight to weed out the hard-core criminals? Can we have an answer to that?

A No.

Q It cannot be done overnight?

A The question --

Q Couldn't you run a fingerprint check overnight, let's say, two days or one day to see whether in fact any of those people was a wanted person as far as the fingerprint check would show?

A A wanted person, right.

Q Wouldn't that in fact weed out virtually everybody we are worried about?

A I don't know. I said before I think even one person reappointed subject to is a kind of step we don't want to take.

Q Where else would you look to see if somebody had done something criminal during this 18-month period when he was out of work?

A What we would want to know is where was that person during that 18-month period of time. We can assume that person was out of the country and we would certainly want to check in whatever way possible to determine what they were doing during that period of time and to verify their statements as well as the forms of employment that they accepted during that 18-month period.

THE COURT: Suppose they were not out of the country. I would gather that in that list the assumption about their possibility of them being out of the country could relate to the Puerto Rican group going back to Puerto Rico. But suppose they weren't out of the country?

THE WITNESS: I wasn't thinking about Puerto Rico, your Honor.

THE COURT: You were thinking of their traveling abroad to Europe?

THE WITNESS: They may have gone to Canada to accept employment or look for employment.

Q Does that mean you have to check the criminal records of those countries they were in, is that the idea?

A Yes.

Q How many people unemployed make those kinds of trips? Is that a significant number of people?

A I don't think even one person. We don't want to appoint a person until we are sure that the individual has not engaged in a gross misconduct while employed by us and that that person might be wanted for some criminal offense. That's the entire point.

THE COURT: What I want to know is you are making this investigation, five former police officers, come up and reapply for a job, and they give the address they had before or that you have on your record, and have lived in New York City for those 18 months, they haven't had a job.

Do you go to Canada to determine whether they have been to Canada, do you make that search, or England or France?

THE WITNESS: I assume that your Honor is saying is if the person didn't reveal to us that he was out of the country, we would go to all foreign nations --

THE COURT: I didn't mean that he didn't reveal to you but by virtue of -- I am not suggesting he is going

to do anything that would not be worthy of a police officer. I am suggesting that he tells you and you get no information that he has been out of the country. Do you check Canada and those places?

THE WITNESS: If the individual told us that he had left the country --

THE COURT: So what you are concerned with then, and I am going to make a characterization of it, is those few people who might have been out of the country, you would have to check on those?

THE WITNESS: That's correct, sir. I think I have reiterated the point often enough that if it's one individual I am concerned.

THE COURT: But it could appear that there could be a possibility, couldn't there, that those individuals you put them on the side in there if one or two of those individuals?

THE WITNESS: If that were the case. Certainly they would not be reappointed.

Q Let's go to your position on constructive seniority dates, and also qualifications.

Supposing a person gave a constructive seniority date pursuant to a court order here and it turns out that on that date he did not have his driver's license, would

you regard that as a disqualification?

A Yes, I think so. That's certainly the rule we have been following in the Acha case.

THE COURT: What happened to his driver's license?

MR. CROWLEY: He had never gotten a driver's license. It's a constructive date.

THE COURT: That's a requirement?

THE WITNESS: Yes, sir.

MR. CROWLEY: He has it now and he didn't have it then.

Q I gather it would be the department's position that if someone is given a constructive seniority date and he did not have a driver's license on that date that he would not be qualified for appointment pursuant to this order?

A Right.

Q Even though that person has a license today?

A Correct.

Q And of course he had to get one to become a Police Department officer so he has had one for sometime?

A Yes.

Q At least since prior to June, '75?

MS. CARROLL: Objection. It's argumentative

and it's established that the witness answered the question. There is no point badgering the witness.

THE COURT: I don't think he is being badgered. Do you think you are being badgered?

THE WITNESS: No, not really. I respect Rosemary's intervention --

THE COURT: I don't think you are being badgered.

THE WITNESS: I feel competent enough to respond.

MR. CROWLEY: Mr. McNulty seems competent enough to withstand these questions.

THE COURT: I think you are.

Q Even though this person has a license or had one at least by June, '75, what is the rationale behind that?

A Well, the rationale is that a police officer at practically any moment may be assigned to a radio motor patrol car. Most of our police officers right now perform radio motor patrol and must be qualified to operate a patrol car.

Q That makes good sense, but you are saying as to his constructive date, which he could not know about, he had to have the license on that date?

A That's right, because he would be required --

Q To drive that constructive car around?

A What we are doing is following the rule laid

down by Judge Duffy in the Acha case.

Q I would suggest to you since it is a constructive date that the important thing is that he have a license today, isn't that correct?

MS. CARROLL: Objection. This is not cross, this is argument.

THE COURT: I think so.

Are you telling me if I have a seniority of March 1, 1962 and you find on March 1, 1962 that I didn't have a license I can't be hired on March 31, 1977, is that what you are saying?

THE WITNESS: I don't think I am saying that. I think that is what Judge Duffy is saying and that is the rule we are following in the Acha case. When the constructive date of seniority was awarded by the special master, if one that constructive date the individual did not possess a driver's license, a valid driver's license and a high school diploma or its equivalency, that the person was not entitled to that constructive date but when they met the two criteria, on whatever date, that would be the date of constructive seniority. I am suggesting we would follow the same rule here.

MR. CROWLEY: We are trying to lay the basis for following a different rule.

THE COURT: There is some logic to that. When you are eligible you are eligible and I suppose that's the logic of the decision.

MR. CROWLEY: In Acha the person appliying had to show an intent to becoming an officer.

THE COURT: In our case it's different, isn't it?

MR. CROWLEY: It's wholly constructive.

THE COURT: In our case they are arguing that they are qualified to be appointed on that day.

We are getting involved with this.

Q Isn't it the case that when somebody is told that he has an appointment date coming up and has to satisfy this, that and the other requirement by that date, don't 95 per cent of those people who don't have licenses just go out and get them before that date?

A I don't know if that's the case. I would assume that if I were put on notice that I might be hired permanently on such and such a date, I would certainly do everything in my power to supply it --

Q These fellows don't have the option, it's constructive date?

A I don't think anybody would not take steps to satisfy all the relevant criteria knowing full well they

wouldn't be appointed.

Q Wouldn't anybody take such steps to get a high school equivalency diploma grad? Those tests are given every wekk, aren't they?

A I don't know. I have no feeling as to that.

THE COURT: Let's recess at this point.

(Recess.)

T4 Q I want to get back to this. Is it true you are a member of the bar?

A Correct.

Q I am even less concerned about the impact of these withering questions.

Again, on what your position might be on these constructive dates and the requirements as of those constructive dates, can you tell me what the department's position would be if, for example, a member of our class had in fact taken an earlier exam but on the PA-15, because he didn't remember or for whatever reason, he wrote he did not take an earlier exam? Would that have any impact on his constructive date?

A I don't think so.

Q I ask it because it has come up in discussion and this may be a disqualifying consideration and I didn't see why and I wanted to put it to you.

A I don't see that as an element at all. I think the basic requirements for appointment would have to be satisfied on the date of constructive seniority. Does that answer the question?

Q Yes, sir.

When you were talking about the 205 and the impact on them, you said something I thought -- well, you said there might be some individuals among the 205 who would be given provisional appointments who would drop in to other funded roles and some would be out of work, is that correct?

A Not necessarily in the 205. It may well happen that some of those in the second group, in the so-called ACE grant, some of those people, the 28 specific people in that grant who are not protected by Judge Duffy's ruling in the Acha case -- some of those people may be pushed out of employment.

Q Of the people on the list of 205, is it correct none of those people will be put out of work by any order coming down in this litigation?

A They would be if they would be displaced necessarily because there is only sufficient funds in the department's budget to cover the 205 positions on March 31st. So ostensibly if some of those 205 were displaced,

they would probably bump people who are hired under the ACE grant, and in some cases people in the ACE grant would be unemployed. It may be some of the people in the 205 would be pushed out of employment.

Q Isn't it a fact there are other pockets of money here and there? Might there not be some other funded roles for those people? Isn't there some possibility that there would be some other funds to look after those people?

If I can hold my question for a second, we all read the headlines over the years in the City of New York how at the last minute the city miraculously finds money for this, that and the other. Isn't there a possibility that that might happen here so nobody would be bumped as a result of this action?

A I doubt that very much. I don't think the city government is disposed that way. The fact that we have laid off 2864 people is an indication that dollars aren't there and the fact we have only promoted five people in over two years is another indication that the money isn't there.

Q At some point in our discussions in court, there have been some suggestions that there will be more funds coming along before too long. I don't want to characterize it. The inference I have drawn is there will be money

before an awful long time and people will be back to work. I thought I heard you say there were no federal funds in sight, did you say that?

A I didn't say there were no more federal funds in sight.

Q Do you expect any more federal funds that could be used for the next three, four months for rehiring?

A I have an understanding that the city government may receive additional CETA moneys sometime during the summer. Whether that will be financing the existing CETA grants in the next federal fiscal year, I don't know. I don't know whether that would carry the people currently employed with CETA funds, or there will be additional dollars available to hire additional people.

Q There are possible CETA funds this summer. Do you know of any other federal funds that may become available?

A Not to my knowledge.

Q So if the people in our class don't get appointed as of this March 31st date, they stand to be out of work for the foreseeable future, is that correct?

A I don't know that they are out of work now.

Q So far as the New York City Police Department they are out of work.

A That's a possibility. If there are no cit-
dollars available or federal dollars, I don't see how any-
body is going to be rehired. It may well be that people
who are currently employed would be laid off if the dollars
aren't available in the next municipal fiscal year.

Q I mentioned earlier, and I think you agree, the
department is roughly 10 per cent blacks and Hispanics
at this time, is that correct?

A Yes.

Q And that roughly 35 per cent of the people who
were laid off in June, '75 were blacks and Hispanics, is
that right? That's approximately. I think the record
shows that.

A If the record shows it --

MS. CARROLL: Objection; the record shows 21 per
cent.

Q In any event, a substantially higher concentra-
tion of minorities have been laid off than are on the force
today, is that correct?

A That is my understanding, yes.

Q You talked before about insecurity and uncer-
tainty in the ranks as a result of what we are submitting
to the court and you talked to the effect on the department
at large.

Aren't you and the chief of the department of personnel concerned about the insecurity and the effect on substantially reducing minorities in this department as a result in the way in which you go at layoffs?

A I don't think we have any voice or any options in terms as we approach layoffs.

MR. CROWLEY: We would propose to strengthen your voice in that matter.

That's all I have.

XXX REDIRECT EXAMINATION

BY MS. CARROLL:

Q I just have one question.

With respect to the 205 who have been on staff, has there been any policy statement by the department with respect to the impact of the disruption of their service regarding the continuity of their performance within the department?

THE COURT: I don't understand the question. So I won't understand your answer. Rephrase it.

Q Do you perceive any advantage to the department from a management point of view in terms of keeping the 205 who are on staff presently on until all rights are definitively determined?

A Yes, I do. I think because the people currently

employed are trained and working in the field. They are in field assignments. I think that if those people were to be displaced now we would immediately lost their services while other people would be trained to replace them.

Furthermore, you raise the inference of continuity of service. I think there would be a problem if persons who displaced existing members were determined not to have satisfied the criteria for a constructive seniority date which would have placed them higher in the list, it may well be that those people would drop back to a lower position and we might be in the posture of now reaching out again to someone displaced or laid off and attempting to rehire those persons. From a management viewpoint, I see a host of immediate problems.

THE COURT: I don't understand the last answer because in answer to Mr. Crowley you said all of those questions about qualifications and seniority would have to be settled before reappointment.

THE WITNESS: That's my point.

THE COURT: If you are not going to do it until all those things have taken place, as you have indicated it wouldn't be wise to do, then your last answer has no relevance because you wouldn't appoint any of these people until all the matters had been settled.

THE WITNESS: If I understand Miss Carroll's questions, from a management viewpoint, would it be disruptive to the department to immediately appoint people who have not satisfied the department for reappointment or for a constructive date of seniority.

THE COURT: I didn't understand that.

MS. CARROLL: That's what I meant.

THE COURT: I thought it was if you were appointing these people.

Anything further?

MS. CARROLL: I have no further questions of this witness.

THE COURT: Thank you very much.

MS. CARROLL: The defendants now call Nelson Almonte.

XXX N E L S O N A L M O N T E, called as a witness by the defendants, after having been first duly sworn, testified as follows:

XXX DIRECT EXAMINATION

BY MS. CARROLL:

Q What is your present employment?

A My present Civil Service title, assistant personnel examiner.

Q What are the duties of that position?

A I am primarily concerned with the appointment of police officers on presently the maintenance of the police officers' preferred list and any action affecting the preferred list.

Q In the course of your duties, have you had occasion to become familiar with the investigations, the background investigations of persons on the preferred list for purposes of their being rehired?

A Yes, I have.

Q Would you describe to the court the number and the nature of such investigations now pending with respect to persons on the preferred list?

A Well, shortly after the layoff the Police Department issued an order that any precinct or police unit that became aware of a laid off police officer being involved in any misconduct, that a report should be prepared and forwarded to the chief of personnel and such reports are being prepared and I get it from the chief of personnel and another unit which is called the central personnel index as to the number of misconducts involving laid off police officers.

I don't know exactly the number. I have been getting something like 207 reports but a small percentage of those reports are favorable reports. So I would say

roughly 180 reports are misconducts.

THE COURT: What do you do with them?

THE WITNESS: First of all I send a copy to the first deputy commissioner who is in charge of all disciplinary action. I send a copy to central personnel index which maintains a centralized file on all police officers active or inactive. Thirdly I send a copy to the applicant investigation section so in case someone is being considered for rehire or reappointment, that they are also aware of what that person may be involved in.

THE COURT: As I understand it, these are reports you get from people on the preferred list?

THE WITNESS: Yes, laid off people.

THE COURT: What indication do you make on the preferred list that you received those reports?

THE WITNESS: On the preferred list, it's nothing. We keep a file by preferred list or number in alphabetical order and also in the sequence in which we get the report. When we are told that the department is getting funds to rehire those people who are being considered, then we check to be sure that their names have not been flagged previously on a misconduct report.

THE COURT: But that's all in one single file?

THE WITNESS: Central personnel index has the

main responsibility of doing that. I do it also just as a backup to be sure that no one --

Q And the matters reported to you are these matters that would generally be investigated by the applications division in assessing the present eligibility of a person for appointment to the Police Department?

A I am sorry, I didn't get the first part.

(Question read.)

A Certainly, yes.

THE COURT: I understand you to say that you received reports of anybody who is involved in misconduct.

THE WITNESS: Yes. Who was laid off --

THE COURT: Any reports of misconduct you receive?

THE WITNESS: Yes.

THE COURT: What does the answer to that other question mean, the last question?

THE WITNESS: Well, I guess any misconduct means anything so that I think what she is saying is would I send a report to applicant investigations on an individual -- the report would be of a nature which may disbar him from rehire.

THE COURT: If you receive a report of misconduct, you have to report it, don't you, to somebody; is

that right?

THE WITNESS: Yes, but most of the misconduct reports -- because the person is laid off -- are outside of the purview of the Police Department.

THE COURT: But as I understand -- I am trying to understand what that last question meant added to what you have said. What I understand is you receive a report of misconduct and you keep that on file and send it to the central file and in the event that any of these people are considered for reappointment they have the information there to flag it and consider that person in the light of the information?

THE WITNESS: That's correct.

Q What does the process involve in that time? Assume that the information has been received regarding misconduct by a person on the preferred list, is the individual applicant afforded an opportunity to present his statement with respect to the incident?

A As per these Civil Service laws, no one can be removed from the preferred list until that person is afforded a hearing. In fact, we haven't removed anybody yet from the preferred list although we have prepared certain reports to the CETA personnel director, Tom Roach, requesting that such hearing be held on a few individuals.

Q How many?

A A small number, four or five, including perhaps one or two who were given medical examinations and were found to be no longer qualified to be a police officer for fractures or what have you.

THE COURT: Are these officers that have been hired?

THE WITNESS: No. They were given medical examinations before.

THE COURT: They are officers that you are contemplating hiring?

THE WITNESS: Right.

THE COURT: And because you have this report on them if they want a hearing they can have the hearing?

THE WITNESS: Right.

Q In addition to misconduct do you receive any other information with respect to status of persons on the preferred list from state institutions or other state authorities?

A From state authorities, no, not that I remember.

Q Do you receive any indication as to imprisonment, for example?

A I have received reports of police -- laid off police officers being arrested and one indicted for murder

and two others --

THE COURT: That's misconduct, isn't it?

THE WITNESS: Right.

Q Have you received any information regarding institutionalization of persons on the preferred list?

A No, just minor or minor arrests which resulted in release a few days later or the same day. As far as someone going to jail for an extended period of time, I have no recollection of any such reports.

Q How many numbers on the preferred list have been exhausted for purposes of rehire to date?

A The CETA hiring is the last hiring that we have gone into. I think right now we are at approximately 830 on the preferred list.

Q And that is out of a preferred list of how many numbers?

A 2864 and I think it's now down to 2850 now.

Q Have you received any indications that the preferred list will be used by city agencies other than the Police Department for hires?

A Well, in the past we, as you know -- the Department of Corrections hired 59 police officers with city money, with tax levied funds, permanent Correction officers. They also hired, previous to that, 46 CETA Correction

officers. The Department of Highways has hired about 200 police officers under the title of meter maids.

Q You mean a person?

A Yes, meter person. The District Attorney's office has hired a number of them as detective investigators and the Transit Authority hired a number of them as railroad clerks or provisional bus drivers. Yes, the list has been used in the past.

As to future hirings when we completed or when Corrections completed the hiring of 59 permanent Correction officers on December 20, 1976, assistant deputy warden Benny, who was in charge of Correction personnel, indicated that the preferred list will be used probably in late March or April by the Department of Corrections. So I suspect that additional hirings from our preferred list is a distinct possibility.

THE COURT: Let me ask you a question. You said that the list was 2850. But when you are talking about these other people using the preferred list, the list you are talking about are those that have been hired from the Police Department itself?

What I am trying to find out is do you delete the list as they are hired in Corrections?

THE WITNESS: Only if they are hired to a

permanent equivalent position. So far that has only happened on the 59 Correction officers. Their names were stricken from the lists.

THE COURT: If they get permanent positions, they are stricken?

THE WITNESS: Yes. Additionally, because of the regulations of Civil Service Commission, anyone who fails to respond to the offer of Correction officer, which is a so-called comparable position to police officer, is stricken, and that person has the option of requesting to the city personnel director, Mr. Roach, to restore his name to the list.

In our case there were 32 former police officers who failed to respond to that Correction officer and never had their names restored to the list, although some of them did later on, so we have I believe 20 in addition to the 59 stricken from the list.

Q Mr. Almonte, has the Police Department, to your knowledge, conducted any survey as to the availability for employment of the 2850 persons remaining on the preferred list?

A Where are they working now?

Q Yes, when they would be available for appointment to the Police Department.

A Not the entire list. For the CETA hiring we canvass from 263 to 830.

Q What indication did you get as to the availability?

A A lot of them are working now and consequently did not qualify. Others were residents of counties not within the immediate five boroughs and consequently were also disqualified by the Human Resources Administration.

Q In terms of response you went through approximately 600 names?

A Roughly.

Q And what was the response rate, if you know?

A We needed 250 positions. Out of those 250, four were allocated to females under the Acha case as per a directive from Judge Duffy. We are talking about 246 positions. The rest of them either didn't bother to show up or were disqualified by the Human Resources who is the unit doing the original screening for CETA eligibility.

Q You have then no estimation of the response rate in the instance of permanent hires at all since these other hires were CETA hires?

A We haven't done any permanent hiring except for the first three people on the preferred list and they were restored back in the early part of 1976.

MS. CARROLL: We have no further questions, your Honor.

XXX CROSS EXAMINATION

BY MR. CROWLEY:

Q You indicated that there are approximately 180 reports of misconduct of people on the preferred list?

A Yes.

Q What kinds of things does that embrace apart from the obvious things like crimes and so on?

A Well, some of the reports refer to investigations that began before those persons were laid off and the investigation was completed subsequent to July 1, 1975. Consequently, the department advocate's office has now so-called charges and a specification pending and the nature of it runs anywhere from bribery receiving to leaving the scene of an accident.

There are too many different things. It isn't really a pattern or anything.

Q Are any people on the list more than once, that is to say, when you have a total of 180, are some of those fellows four or five times?

A A couple of times, yes.

Q Do you know the minority makeup of the 180? It's less than 180?

A No.

Q You were told earlier that the minority makeup of the whole list is roughly 20 per cent. Is there any indication that it's more than 20 per cent?

A I could run a check but I would be hesitant to give you any figures.

Q 20 per cent of 180 would be 36 people, putting to one side the indication of repeaters, do you think it's likely it's more than 36 minorities?

A No, I think you are in the ball park.

Q As to the hard-core crimes or people who are alleged to have committed crimes, I presume that those could be readily reviewed from the documents that you have? You can identify people who have been charged with major wrongs, is that correct?

A Yes.

Q And those documents are all centrally located?

A Yes.

Q You mentioned culling 600 names in connection with the CETA hiring and having to reject a great many along the way. Isn't that primarily because of the residency requirement and the unemployment requirement?

A Those are the two main requirements. There isn't anything else really except four or five individuals

that we got permission from the city personnel director not to offer them positions because of serious misconduct that they have.

Q How did they come up with the list of four or five?

A Central personnel index ran a check. I gave them numbers 262 to 900 in the preferred list and everybody was checked and those four or five had serious enough --

Q Out of how many?

A About 600.

MR. CROWLEY: No further questions.

THE COURT: Thank you.

(Witness excused.)

THE COURT: Anything further?

MS. CARROLL: We have nothing further, your Honor. We have no further witness testimony. We would want to urge the court that we be permitted to submit evidentiary information regarding the PA-15's to the court prior to any ruling.

THE COURT: I think the time has come to make a decision on this. We have been doing this for a week and I haveheard all this evidence and if you want to make any argument, I will hear it. But if you mean you are

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going to present things in terms of a decision tomorrow or some other time, I am not going to have that. I am going to make a decision today in regard to this. I had hoped that this decision could be reached as a mutually agreeable one but apparently it is not.

So the record is closed as far as my consideration is concerned. If you don't have any evidentiary matters, I will hear whatever statement you want to make in argument. At this point I don't know who the moving party is.

MR. CROWLEY: Your Honor, we would submit that the evidence we have heard and the arguments we have heard during the past week and along the way indicate not so much the real problems that there are with going forward along the lines that we have suggested as indicated that there was a reluctance to do anything affirmative on the part of the defendants and we would urge that it would be appropriate for your Honor to make a ruling at the outset about exam 7017 and 7046.

We think it's clear those exams were made up in exactly the same way, if not worse ways than exams that were considered at greater lengths by the Rand people and by witnesses. We think the record is adequate and those people are entitled to relief as anybody else.

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THE COURT: I received information via a Miss Steinbock that you and the city had agreed that these earlier examinations were not going to be considered. I thought that's the information I received and if the issue came up that you were going to raise it at some future time. Is this the future time?

MS. STEINBOCK: If I may speak to that. I did speak to one of your law clerks and for purposes of this investigation of the raw data, Mr. Brennan and I agreed that we would look at those exams in terms of the raw data.

We did not say at that time that we agreed that those would be examinations at issue. The reason we did that, as indicated in my affidavit, is because we did not need the raw data for exam 7017 and 7046.

THE COURT: I am not satisfied, frankly. As I understand, the exams in C are examinations that predate the examinations that the Rand study focused on and as far as I am concerned exams in question are in Exhibit B. I thought the Rand study indicated that they took the exams and any exams between them, the two exams mentioned, but I think the exams you are talking about occurred prior to that time.

MR. CROWLEY: I was very much involved in the

setting up of the Rand study.

THE COURT: I can't accept that as any evidence. I am talking about what I read, based upon the factual findings. I can't accept a statement as that.

MR. CROWLEY: If you look at the Rand statement, it will say what I am about to say. We picked two exams simply because it would be an expensive survey to conduct. It was thought that might give some indication of the pattern for some other prior examples. The Rand people focused on two. They addressed their report, in my understanding, and I will look at it again, to exams in the times somewhat prior to that. 7017 and 7046 were given in --

THE COURT: I have the report. Where is that?

MR. CROWLEY: If you look at page 46, your Honor, I don't know where -- I am looking at a quote from your opinion. I misspoke. I should say Rand report 38.

THE COURT: 46 --

MR. CROWLEY: I was wrong on that, it's 38.

THE COURT: I understand that but they are talking about 8046 and 0013 and the passing grade for the recent exams they are talking about. They use the word recent.

The only indication, as I recall here, is that they are confident that the exams that were given between

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the two that were actually thoroughly studied were the same. But I don't see any reference to anything before that.

I don't want to interrupt your argument.

MR. CROWLEY: We don't have the Rand report here. I think that is not the case but we can look at it quickly if you take a short recess. I think it's an important case and it won't take us very long.

Let me go on and we will come back to that, if I may.

THE COURT: As I understand, Exhibit B covers the examinations that are specifically covered by what I understand in my opinion. Exhibit C is what you think it ought to cover.

MR. CROWLEY: Yes, sir.

THE COURT: We will deal with Exhibit B.

MR. CROWLEY: We would like a chance to look for the Rand language that we think goes another way.

Our suggestion is that your order go ahead and order that the appointments be made from Exhibit B and Exhibit C depending on the result and that that can be done either on or before the 31st or that all appointments be deferred until after some certain other steps be taken. We don't see any reason really given the relative

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manageability of the difficulties raised by defendants why it couldn't be done by the 31st.

On the other hand, if your Honor doesn't agree with that conclusion we would urge that all appointments be deferred rather than letting these appointments go forward. They have not come forward in our opinion with enough indication of the risk to the city and in terms of loss of funds to warrant disregarding the members of this class any longer.

It's clear from the testimony today that the members of this class could be disregarded for a long time if they don't find themselves getting appointment with this next round of appointments.

THE COURT: I must say I have been disturbed by especially Mr. McNulty's statement about these temporary appointments and the agreement not to bump and his understanding, as a matter of fact, that the CETA funds -- that even though I had signed an agreement allowing the appointments subject to the rightsin this case, that, as a matter of fact, these parties in this case may never be able to get an appointment by virture of what he understands the Labor Department to feel or their view to be.

I am greatly disturbed about that. I am beginning to wonder whether the same kind of thing could well

happen with regard to the members of the class in respect to any appointment.

MR. CROWLEY: I don't know what I suggest. I guess it's an order of appointments being made from list B or B and C and that that be done by the 31st.

THE COURT: Or if not that they be deferred until they can have a permanent list. All right. That's how the suggested order reads, in the alternative.

MR. CROWLEY: Is it clear the 205 people are not CETA funded people?

THE COURT: Yes. I know that. I wasn't talking about them. I was talking about two orders I had issued on the basis of the fact that they may have some effect on this class and apparently now it appears at least by the people in charge that it has no effect whatsoever.

I will hear you, Miss Carroll.

MS. CARROLL: Before I start my argument, I wanted to make something clear with respect to the CETA hires and you mentioned Mr. McNulty's testimony.

By virtue of getting the 25 women hired on March 31st, '71 as part of that group and not having them have the first right to the CETA hires which would have eliminated the CETA hires because the women could not have qualified, because of that the CETA problem as far as

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hiring in the Police Department appears to be non-existent. But at the time in question there was some possibility that if we did not effect the women's hires on permanent hires as part of the March 31st package that the CETA hires could not have gone through.

In fact, we believe that this CETA problem has been obviated by virtue of that, that we do not see a problem vis-a-vis the CETA hires other than that some persons in the 205 who would ordinarily bump back to the CETA positions given the plaintiff's better rights to the 205 positions, those people will not be able to satisfy CETA eligibility because they have in fact been working for the last year so they may be bumped entirely out.

It may be that the Police Department would be able to get a waiver from the Department of Labor or a decision by them that the provisional hiring was not employment under the CETA statute but at this point we have no such ruling and we can assume that if the 205 or part of the 205 are bumped then they will not be able to take the CETA positions that become available on April 1, 1970. I think that's the confusion that we are trying to clarify earlier.

THE COURT: I am aware of your solicitude and concern for 205 but you are also aware that I have some

concern for the 205 and there is also the plaintiff's class.

MS. CARROLL: I am saying the CETA hires will not be foreclosed to those people. If that's the implication of the testimony, that was remedied by the hiringof the 25 women from permanent lines. If they were not hired that would block the eligibility.

THE COURT: All I can say is that that is not the implication of Inspector McNulty's testimony but, in any event, proceed.

MS. CARROLL: We have had hearings and there have been submissions on the very difficult question of how the preferred list should be used with respect to hirings on March 31st of police officers. There is necessarily involved in all decisions which attempt to create constructive rights under a remedial statute a problem of balancing the rights of all persons concerned.

There are, of course, the rights of the plaintiff in this case as well as the rights of the persons who are on staff as well as the interests of the department and continuity of service.

From our point of view, we believe that those rights, whatever they may be, should be definitively decided by a formula that is applied to all persons who have

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been seeking employment with the Police Department in a fashion that can reasonably be expected to certify the applicable facts.

Those facts were the basis of hearings in the Acha case. Those facts that were developed were the materials that form the 20-odd questions on the PA-15 with respect to the satisfaction of eligibility requirements for employees. The persons on the preferred list, while we concede on the date of appointment prior to layoff did in fact satisfy these eligibility requirements, we are not talking about that date. We are now talking about giving them a constructive seniority date which jumps a freeze period for three years and in fact goes to 1968 and 1969.

It has been the department's position in the Acha case that -- and Judge Duffy has upheld us on this point -- those requirements must be applied to all persons, women, minority and non-minority of police applicants. We would thus urge that the department be given an opportunity to certify the materials that were developed by the plaintiffs and are a part of Exhibit B as a part of our records.

We also have the fact that the investigations pending with respect to persons on the preferred list --

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and we have the instance of charges and specifications that were being processed at the time of the layoffs and have now come to completion in the interim. All those matters should be dispositively resolved by appropriate administrative action and by submissions of the effect of the parties as well so that it can be established what rights exist and what appropriate adjusted seniority dates there should be.

With respect to examination 7065 and 8046 which are the earliest examinations which in our view are before the court and were the subject of the Rand study, those examinations were entirely culled in the administrative review that occurred prior to the freeze in 1970. Every one of those lists were given an opportunity to be screened and for appointments to be made from those lists.

It is our position that no one on those two lists should get an earlier appointment date because they had an opportunity to get appointed and did not do so before the freeze for one reason or another.

With respect to those two examples the department made special efforts to retrieve people who either were unqualified at that date or had lost interest or had for some reason dropped out of the appointment process.

THE COURT: You are talking about the list that

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the plaintiffs have listed in Exhibit C?

MS. CARROLL: No, your Honor, the top part of Exhibit B. Those persons who went --

THE COURT: The top of Exhibit B?

MS. CARROLL: They went through examination 7065 and passed but were below the median. Those persons had an opportunity to be appointed prior to the freeze because those lists were entirely exhausted. Anyone who passed that examination was in fact made part of the candidate selection process prior to the freeze and all rights to appointment and appointment dates should have been certified prior to the freeze.

It would be our position that no one in that status should be permitted to now get an earlier appointment date when everyone on that list, minority as well as non-minority persons, had their appointment date certified at the earlier time.

Our second proposition would be that with respect to the veterans' preference credit, there remains to be determined whether or not non-minority as well as minority persons who are on staff who are among the 205 and who might be subject to bumping by virtue of the greater seniority rights of the plaintiffs on the list of 94, that those persons also must be notified of the possible impact

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and be given an opportunity to submit information regarding their veterans' preference or other information which would impact on their appointment date.

THE COURT: I don't understand that. Don't you have that on there?

MS. CARROLL: Certain persons who had veteran status and were high on the list would not bring that to our attention because it would not affect them. Now in terms of keeping their jobs, it may well be that that would advance their rights at the time.

THE COURT: I don't understand that. Wouldn't they have had to use their veterans credit in order to have stayed in the police force?

MS. CARROLL: No. There was testimony to that effect additionally.

THE COURT: All right.

MS. CARROLL: They would not have.

THE COURT: I don't understand any veteran that didn't use it no matter what his score was.

MS. CARROLL: The reason is because the entire list was exhausted, their rights were established seven years ago and if they were above the median appointment date they had no need to use their credits and they could use it for promotional exams and other things.

THE COURT: Didn't they determine their seniority in the department?

MS. CARROLL: No, your Honor.

THE COURT: I thought that your veteran's status gave you a certain number of points and that certain number of points would determine the seniority.

MS. CARROLL: The veteran's credits can be used for purposes of adding points. They can be used on entry level exams or promotional exams. Where an individual has gotten above the median point and he knows the entire list has been gone through and he has already gotten an appointment. He wouldn't use it and he would use it for promotions. That is apparently the practice generally.

The other point I wish to make is with respect to examination 8018, that was no where in the record in this case. 8018 is not even a police officer examination, it's an examination I believe for Transit Authority officers. It would be our position that certainly the persons on the preferred list, whose position on that list is by virtue of taking police officer examinations, have greater rights whatever their ethnic background to a position with the Police Department than does a person who took a Transit Authority examination or was only fortuitously appointed to the Police Department.

It would be our position that to do that, to use the plaintiff's construction of the number and types of examinations available --

THE COURT: What exam is that?

MS. CARROLL: 8018, in Exhibit D, your Honor.

THE COURT: I am only involved at the present time with Exhibit B.

MS. CARROLL: With that understanding, I would reserve that comment with respect to any further --

THE COURT: I haven't been advised that Exhibit C is in this case yet.

MS. CARROLL: It would be our position that a statute like Title 7 which is geared to make applicable the premise that employment should be available to all persons on equal terms, that such a statute which necessarily to a large degree involves social engineering and perhaps a social engineering that's very necessary, nonetheless when that kind of a statutory regulation impacts on persons' lives a court should be very wary in ordering relief until the relative respective rights of the parties are determined as fairly and securely as can be done within reason.

We feel that at this point the department should be given an opportunity to certify those rights.

Vis-a-vis the impact on morale, it's not an insubstantial question that the department in reordering the preferred list without having undertaken this more exhaustive examination or subject to it, as counsel for the plaintiffs suggested, would in effect be making employment decisions regarding people and might thereafter -- and I don't believe that this is, given the testimony of Mr. Almonte and Inspector McNulty -- might have to replace these people over and over again.

It seems to us waves of hiring and layoff and rehiring are not in the best interests of the plaintiffs and certainly not in the best interests of the Police Department. It would be our view then that the court permit the hirings of March 31st to continue based on a rank order listing from the preferred list, that the city be permitted to develop refutation to the person's status as indicated in Exhibit B and that the court set a timetable for the submission of that information so that when the preferred list is ordered that it represent a definitive and final statement of the relative rights of all persons who are seeking employment with the Police Department.

Also at this point we would say that the question -- the rationale of using a median appointment date

as a basis for hiring is not supported by the record, either the record here or the record that was adduced before this court during the trial of the preliminary injunction. Because there was significant testimony at that trial which indicated that the hirings that were done prior to the freeze as well as after the freeze were done in such a first-certified, first-hired basis and not specifically geared to rank order, that selecting the median appointment date at this point is arbitrary at best and the defendants would believe that some briefing of that issue would be appropriate here.

I believe that the admonition of Judge Weinfeld in the Vulcan case regarding the to be avoided conditions of judicial involvement in the case of this kind is very appropriate here. While certainly the impact in terms of resentment of employees would not be the beginning and end point of a court's inquiry certainly that is a question that must be before the court and it would seem to us that the rights of all persons affected should be safeguarded by virtue of notice as well as by giving those other persons an opportunity to establish their appointment dates as well.

It might be a possible alternative for the court to consider reordered seniority dates based on a

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rationale not so much geared to the median appointment date which leaps back to seven years, but rather one that is founded more logically in terms of a statute of limitations cut-off.

It would be our position that such a formula which would be definite might well be a much better way to deal with the problem of competing employee interest for a limited number of positions.

MR. CROWLEY: Just a couple of words, your Honor. On the question of the earlier exam, looking at the Rand report, it's clear exam 8046 was given in July, '68, 0013 was given in May, '70. The reason for the picking of the 8046 was that was the last exam from which appointments were still being made at the time the survey was done.

On page 38 of the report talking of 0013 the report goes on to say, "Therefore, we are confident that the patterns observed for exam 0013 are not unique for that exam but are typical of all recent Civil Service exams." The dates of 7047 and 7046 are September, '67 and February, '68.

In other words, they are very much around the time of the examinations and the record shows they were prepared in the same way. It's reasonable to believe that

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the same kind of examinations were given. We can conclude that it would be appropriate to include the people who were tested.

As far as the balance of the arguments of the defendants it seems to me that it ought to be borne in mind that the members of the class didn't create the examinations which, in fact, were discriminatory. They have been the ones out of work. If we are goingto be sensitive about morals and propriety and so on, we ought to lean into the consideration of the interest of the members of the class who have been out of work for all this time and go forward with an expeditious result on March 31st rather than deferring that, as the city keeps urging, to sometime in the future when all these issues may be moot.

MS. CARROLL: I would want to make one point with respect to the exams to be considered. The reference in the Rand report to 8046 and 0013 to be the examinations chosen and to be representative samples of exams prepared during that period is taken out of context because there is a prior recitation in the Rand report dealing with the exams in question and your Honor had specifically, I thought, ruled on the propisition that only those exams which we documented in terms of making submissions to the court were the ones which would be considered. These other exams --

jqjb 55

there is neither a copy of them in the record nor was there any testimony about that point.

I believe that the sole reference to them was that it was an extract of a report that was never completed.

THE COURT: I don't believe I have any other choice in the matter. I had hoped that the parties would agree upon a procedure or that they would offer some alternatives.

The city has taken the position from one or about the 18th, and in spite of our meeting last week its position has not changed, and that position simply is that to allow them to go ahead with these appointments and they may or may not include some of the people in the plaintiff's class who, pursuant to my decision, may be entitled to a greater seniority.

If they are included, fine, that's happenstance, but if they are not included, then let us go ahead with these appointments and then we will settle the matter at some future time.

Inspector McNulty indicates that he feels it could have been done, and it could have been done within a month. This apparently has been lost in the argument, about not doing it, and I don't get any feeling that the

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defendants are any closer to really dealing with this problem than they were about ten days ago.

My purpose, of course, in these hearings was to attempt to have the Police Department come up with some solution that would affect the rights of these parties and would consider the rights of the parties, the members of this class. But that hasn't been done and, therefore, I am going to sign the order and the order, of course, in terms of my order is going to relate solely to the list in Exhibit B. Those are the only exams, as far as I know, that have been documented and the substance of the order that's being signed is that appointments will be made from that list or appointments will be deferred until a permanent list can be made and I am doing this also, again from Inspector McNulty's testimony, as I said before, about the CETA appointments which I had authorized the Police Department to make appointments with the understanding that it would be subject to the rights of these pepole in this class and I now am faced with the understanding of a person in the department that pursuant to an agreement with the Labor Department that they have that it's doubtful that members of this class could be appointed with CETA funds because one of the agreements is that no one should be bumped.

So my concern now is that I don't know what's going to happen with these permanent appointments and how far that's going to go. So my concern is that, it seems to me, at least according to my ruling, that the members of the plaintiff's class in B are entitled to have their rights considered and observed and not deferred indefinitely. So the order is signed.

Anything further?

MR. CROWLEY: No, your Honor.

MS. CARROLL: Is the entire plaintiff's order signed or what you have just read?

THE COURT: I am signing the order that the plaintiffs have cited and I am limiting it to the first part of the order in terms of the class, those listed in Exhibit B which is attached to Miss Steinbock's affidavit.

MS. CARROLL: I want to make certain.

THE COURT: And that order says that the appointments shall be made from that class or, in the alternative, if that's going to be disruptive, that all appointments be deferred until the matter can be permanently settled.

MS. CARROLL: Then I would request a stay.

THE COURT: That's denied.

WITNESS INDEX

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EXHIBIT INDEX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ and FELIX E. SANTOS,	:	Civil Action 76 Civ. 1982 (RLC)
Plaintiffs,	:	
-against-	:	NOTICE OF SETTLEMENT
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,	:	
Defendants.	:	

- x

S I R S :

PLEASE TAKE NOTICE that the within is a copy of a proposed order which will be submitted for settlement and signature to this Court, the Honorable Robert L. Carter, U.S.D.J., in the United States Court House, Foley Square, New York, New York, on the 18th day of March, 1977.

Dated: New York, New York
March 18, 1977

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Attorneys for Plaintiffs

TO:

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Attorney for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ and FELIX E. SANTOS,	Civil Action 76 Civ. 1982 (RLC)
Plaintiffs,	
-against-	ORDER FOR PRELIMINARY INJUNCTION
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,	
Defendants.	

WHEREAS, a hearing on plaintiffs' motion for a preliminary injunction having been had and the Court having made findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a) in an opinion dated March 17, 1977 holding that the practices of the New York City Police Department ("NYCPD") in connection with the laying off and recalling of police officers violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000(e) et seq.; and

WHEREAS, the Court is aware that defendants presently intend to recall and rehire on March 31, 1977 and thereafter a significant number of NYCPD police

officers in reliance upon discriminatory seniority lists, examinations and height requirements promulgated by the defendants; and

WHEREAS, plaintiffs have moved to have this case certified as a class action pursuant to Fed. R. Civ. P. 23; and

WHEREAS, the Court finds that the class as defined below will satisfy the requirements of Fed. R. Civ. P. 23(a) and 23(b)(2) for the reasons set forth in the Court's opinion dated March 17, 1977, it is

ORDERED that:

1. The defendants, their officers, agents, servants, employees and attorneys are preliminarily enjoined from laying off or temporarily or permanently recalling any police officers until seniority lists are reordered to accord plaintiffs and members of the class the seniority that they would have had but for defendants' discriminatory practices.

2. The defendants are directed to reorder the NYCPD seniority lists in a manner that will afford plaintiffs and members of the class the seniority they would have had but for defendants' unlawful practices.

3. The class shall consist of all those black and Hispanic New York City police officers whose seniority is lower than it would otherwise be but for the discriminatory practices of defendants.

4. A further hearing shall be held on

March 25, 1977 for the purpose of determining the appropriate relief to be accorded to the plaintiffs and members of the class and at which time the parties shall submit proposals for the reordering of the seniority lists.

Dated: New York, New York
March 18, 1977

U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ and FELIX E. SANTOS,

Plaintiffs,

-against-

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

Defendants.

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Civil Action
75 Civ. 1981
(RLC)

NOTICE OF SETTLEMENT

S I R S :

PLEASE TAKE NOTICE that the within is a copy of a proposed order which will be submitted for settlement and signature to this Court the Honorable Robert L. Carter, U.S.D.J., in the United States Court House, Foley Square, New York, New York, on the 31st day of March, 1977.

Dated: New York, New York
March 21, 1977

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TO:

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Corporation Counsel
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Attorney for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ and FELIX E. SANTOS, Plaintiffs,	Civil Action 76 Civ. 1982 (RLC)
-against-	ORDER FOR PRELIMINARY INJUNCTION
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department, Defendants.	

WHEREAS, a hearing on plaintiffs' motion for a preliminary injunction having been had and the Court having made findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a) in an opinion dated March 17, 1977 holding that the practices of the New York City Police Department ("NYCPD") in connection with the laying off and recalling of police officers violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000(e) et seq.; and

WHEREAS, the Court is aware that defendants presently intend to recall and rehire on March 31, 1977 and thereafter a significant number of NYCPD police

officers in reliance upon discriminatory seniority lists, examinations and height requirements promulgated by the defendants; and

WHEREAS, plaintiffs have moved to have this case certified as a class action pursuant to Fed. R. Civ. P. 23; and

WHEREAS, the Court finds that the class as defined below will satisfy the requirements of Fed. R. Civ. P. 23(a) and 23(b)(2) for the reasons set forth in the Court's opinion dated March 17, 1977, it is

ORDERED that:

1. The class shall consist of all those black and Hispanic New York City police officers whose seniority is lower than it would be but for the discriminatory practices of defendants.

2. Defendants are directed to develop constructive seniority dates for members of the class and submit the revised seniority dates to counsel for plaintiffs within seven days of this order so that this list may be used for the next rehiring or recall of police officers by the NYCPD. All members of the class who were subject to layoffs in June 1975 shall be given constructive seniority dates which shall be the earlier of the following:

a) the candidate's actual seniority date; or

b) the median date of appointment

from the earliest examination which the class member took, i.e., the date by which one-half of said appointees were appointed.

3. Class members discriminated against by the height requirement shall be given a constructive seniority date which shall be the earliest of the following:

(a) the date they would have been appointed but for the discrimination caused by the existence of the height requirement at the time of the first examination they took; or

(b) the median date of appointment with respect to the earliest examination they would have taken but for the height requirement; or

(c) the date they would be given pursuant to the reordering set forth in 2(a) and 2(b) above.

4. The parties are directed to confer with a view to submitting to the Court a proposal for a final order and decree herein; those discussions shall include consideration of the following matters:

(a) "back" and "front" pay for members of the class;

(b) other possible incidents of retroactive seniority for members of the class;

(c) the structuring of future examinations, including consideration of preferences

new examinations on a qualifying rather than a ranked basis;

(d) the use of lists promulgated on the basis of the 1973 entry level examination; and

(e) attorneys' fees.

The parties shall submit their joint or, if necessary, separate proposals for a final decree and order within thirty days after the date of this order.

5. The interim relief granted herein shall be without prejudice to whatever rights members of the class may have as adjudicated in a final order and decree.

6. The Court retains jurisdiction for such period as is necessary to supervise this order and further proceedings herein and to determine the reasonable value of plaintiffs' attorneys' services.

Dated: New York, New York
March 21, 1977

_____
U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ and FELIX E. SANTOS,	Civil Action 76 Civ. 1982 (RLC)
Plaintiffs,	
-against-	NOTICE OF SETTLEMENT
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,	
Defendants.	

S I R S :

PLEASE TAKE NOTICE that the within is a copy of a proposed order which will be submitted for settlement and signature to this Court, the Honorable Robert L. Carter, U.S.D.J., in the United States Court House, Foley Square, New York, New York, on the 28st day of March, 1977.

Dated: New York, New York
March 28, 1977

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Attorneys for Plaintiffs

TO:

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Corporation Counsel
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New York, New York 10007

Attorney for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ and FELIX E. SANTOS,	:	Ci il Action 76 Civ. 1982 (RLC)
Plaintiffs,	:	
-against-	:	ORDER
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPAPTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,	:	
Defendants.	:	

- x

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WHEREAS, the Court is aware that defendants presently intend to recall and rehire on March 31, 1977 and thereafter a significant number of NYCPD police

officers in reliance upon discriminatory seniority lists, examinations and height requirements promulgated by the defendants; and

WHEREAS, plaintiffs have moved to have this case certified as a class action pursuant to Fed. R. Civ. P. 23; and

WHEREAS, the Court finds that the class as defined below will satisfy the requirements of Fed. R. Civ. P. 23(a) and 23(b)(2) for the reasons set forth in the Court's opinion dated March 17, 1977, it is

ORDERED that:

1. The class shall consist of all those black and Hispanic New York City police officers whose seniority is lower than it would otherwise be but for the discriminatory practices of defendants.

2. All members of the class who were subject to layoffs in June 1975 shall be given constructive seniority dates which shall be the earlier of the following:

(a) the candidate's actual seniority date; or

(b) the median date of appointment as determined by the median score of the earliest examination which the class member took, i.e., the date by which one-half of said appointees were appointed.

3. Class members discriminated against by the height requirement shall be given a constructive seniority date which shall be the earliest of the following:

(a) the date they would have been appointed but for the discrimination caused by the existence of the height requirement at the time of the first examination they took; or

(b) the median date of appointment as determined by the median score of the earliest examination they would have taken but for the height requirement; or

(c) the date they would be given pursuant to the reordering set forth in 2(a) and 2(b) above.

4. The constructive seniority dates for members of the plaintiff class having been determined in accordance with paragraphs 2 and 3 above, class members indicated on the lists attached hereto shall be afforded the opportunity to return to employment as police officers in the NYCPD in the NYCPD rehirings on March 31, 1977 and April 1, 1977. All police officers rehired on the above dates shall be informed that their employment is subject to the outcome of this litigation.

5. In the event that defendants do not include the police officers whose names are annexed hereto in the NYCPD rehirings on March 31, 1977, the defendants, their officers, agents, servants, employees and attorneys are preliminarily enjoined from laying off or temporarily or permanently recalling any police officers. This injunction will remain in effect until the preferred lists in the NYCPD are reordered to accord plaintiffs and members of the class the seniority

that they would have had but for defendants' discriminatory practices.

6. The parties are directed to confer with a view to submitting to the Court a proposal for a final order and decree herein; those discussions shall include consideration of the following matters:

(a) "back" and "front" pay for members of the class;

(b) other possible incidents of revised seniority for members of the class;

(c) the structuring of future examinations, including consideration of promulgating new examinations on a qualifying rather than a ranked basis;

(d) the use of lists promulgated on the basis of the 1973 entry level examination; and

(e) attorneys' fees.

The parties shall submit their joint or, if necessary, separate proposals for a final decree and order within thirty days after the date of this order.

7. The interim relief granted herein shall be without prejudice to whatever rights members of the class may have as adjudicated in a final order and decree.

8. The Court retains jurisdiction for such period as is necessary to supervise this order and further proceedings herein and to determine the reasonable value of plaintiffs' attorneys' services.

Dated: New York, New York
March 28, 1977

U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- - - - - - - - - - - - - - - - - - -x

THE GUARDIANS ASSOCIATION, et al.,

Plaintiffs,

-against-

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - -x

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SARA E. STEINBOCK, being duly sworn deposes and says:

1. I am a member of the Bar of this Court and am one of the attorneys representing plaintiffs in this action. I am fully familiar with the facts and circumstances of this case. I submit this affidavit in opposition to the defendants' motion for a stay of the District Court's order pending the determination of the appeal from that order.

2. Defendants' motion for a stay is the most recent step in a long history of delays and obfuscation which has resulted in the denial of plaintiffs' rights for years. Contrary to defendants' assertion, the history of this litigation and of its predecessor, Guardians Association, et al. v. Civil Service Commission, et al., 72 Civ. 928 (Guardians I), speak eloquently for the fact that Judge Carter's order must not be stayed if plaintiffs are ever to recover from the discrimination they have been found to have suffered.

3. Guardians I was filed in March 1972 challenging, inter alia, the entry level examinations challenged herein. Although the District Court (Ryan, J.) assumed that plaintiffs had made a prima facie showing of discrimination, plaintiffs' motion for a preliminary injunction was denied on the ground that the existing lists were about to be exhausted.

4. Plaintiffs made an expedited appeal from Judge Ryan's decision. The Second Circuit affirmed the District Court's order on the ground that the lists from the examinations complained of were about to be exhausted and the action was therefore moot. Guardians Association v. Civil Service Commission, 490 F.2d 400, 404 (2d Cir. 1973).

5. Defendants were able to avoid a decision on the merits in Guardians I by delaying and failing to cooperate until the hirings of the Police Department made that action moot. In the instant case, defendants have continued to delay in the apparent hope that the action will again become moot.

6. On March 17, 1977 the District Court (Carter, J.) issued an opinion after lengthy evidentiary hearings holding that the hiring and layoff practices of the NYCPD violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and granting a preliminary injuction restraining the NYCPD from firing or recalling any police officers until seniority that they would have had but for defendants' discriminatory practices. That opinion is attached hereto as Exhibit A.

7. At the time Judge Carter issued his opinion all parties and the Court were aware that the NYCPD was scheduled to rehire approximately 250 police officers on March 31, and April 1. The Court then ordered expedited proceedings, as detailed below, in order that the plaintiff class be included in those hirings.

8. At a hearing on March 21, 1977, the District Court ordered the parties to cooperate in constructing relief consistent with the Court's order. It was defendants' position at that time -- and continues to be their position -- that no relief whatsoever should be granted. Defendants refused to submit any proposal for reordering the seniority lists.

9. At a hearing on March 23, 1977 the District Court ordered the parties to endeavor to gather the data necessary to provide relief to members of the plaintiff class. At that hearing, defendants contended that such data could not be developed before the hirings scheduled for March 31, 1977 and April 1, 1977. It was plaintiff's position that this information could be gathered and indeed must be gathered immediately to effectuate the District Court's opinion of March 17, 1977.

10. As detailed in my affidavit to the District Court, attached as Exhibit B hereto, plaintiffs worked around the clock to compile the data in order that members of the plaintiff class could be included in the re-hirings of March 31 and April 1. Although defendants were ordered to work with plaintiffs in this effort, no assistance from defendants was provided. Plaintiffs attempted to deliver the raw data which they developed to defendants on Friday,

March 25, 19 , but were unable to do so, because counsel for defendants was not available to accept delivery. Plaintiffs again attempted to deliver this material to defendants on Saturday, March 26, again without success.

11. Plaintiffs' method of determining the mean appointment date was fully set forth to the District Court and to defendants and is described in my affidavit attached as Exhibit B hereto. I respectfully refer this Court to Exhibit B for a description of plaintiffs' procedures and methodology. The constructive median appointment date determined by plaintiffs is consistent with the date stipulated to by the parties in Acha v. Beame, 531 F.2d 648 (2d Cir. 1976) and that ordered by this Court in Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976).

12. Defendants state in the affidavits accompanying their motion that a number of those persons ordered rehired by Judge Carter have already been recalled and others have problems which would prevent their recall (Codd Aff. ¶ 9). Whatever inaccuracies there are in plaintiffs' list are solely due to the refusal of defendants to cooperate in compiling any such list, although ordered to do so by the Court.

13. Commissioner Codd states in his Affidavit that forty-nine (49) members of plaintiff class are appropriate candidates for recall (¶ 9). Although plaintiffs do not concede that these 49 persons are the only members of the class who should be hired at this time, because of the urgency of this matter plaintiffs will agree that these 49 people should be immediately rehired with a review of all class members to be made immediately thereafter.

14. As a result of defendants' seniority system, minorities have been disproportionately affected by the layoffs of police officers which began on June 30, 1975. Although minorities comprise only 10-11% of the NYCPD, 21.5% of those laid off were minorities. Although some minority police officers have been recalled in the rehirings since June 30, 1975, minorities continue to bear the impact of a greatly disproportionate rate of layoff.

15. It has been defendants' positon throughout this litigation that nothing whatsoever should be done to afford relief to plaintiffs as ordered by the District Court until all appeals are fully completed. The hirings scheduled for March 31 and April 1 are the only future hirings known at this time. If plaintiffs are not included in these rehirings as ordered by the District Court, they will be without employment for the indefinite future.

16. Judge Carter's order provides that all persons to be hired, including plaintiffs, sign an acknowledgment that their rights are subject to the outcome of this litigation. If the long process of appeals, which may take years, result in a reversal of that decision, plaintiffs can at that time be replaced. The presumption at this time should be in favor of plaintiffs who have been found to have been discriminated against by the District Court and who have been ordered rehired by that Court. Plaintiffs should, therefore, be granted the relief ordered by the District Court at this time.

_____
Sara E. Steinbock

Sworn to before me this
30th day of March, 1977

_____

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SESTANDICK

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- X

THE GUARDIANS ASSOCIATION, et al.,

Plaintiffs,

-against-

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.,

Defendants.

- X

ORDER

WHEREAS, the District Court (Carter J.) having made findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a) in an opinion dated March 17, 1977 holding that the practices of the New York City Police Department ("NYCPD") in connection with the laying off and recalling of police officers violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000(e) et seq.; and

WHEREAS, the District Court having ordered that members of plaintiff class be rehired on March 31 and April 1 or, in the event such plaintiffs were not included in those rehirings, that defendants be preliminarily enjoined from laying off or recalling any police officer in an Order dated March 28, 1977; and

WHEREAS, defendants having moved before this Court on March 30, 1977 for a stay of the District Court's Order of March 28, 1977 pending the determination of the appeal from that order; and

WHEREAS, argument having been heard on March 31, 1977 on defendant's motion for a stay of the District Court's Order of March 28, 1977 pending the determination of the appeal from that Order, it is

ORDERED that the Order of the District Court dated March 28, 1977 be stayed pending the determination of the appeal from that Order subject to the following conditions:

1. The New York City Police Department ("NYCPD") shall notify police officers who are rehired before such time as this Court determines the appeal in this action that their rights to employment in the NYCPD are subject to the outcome of this litigation;

2. Defendants are placed on notice that back pay may be granted by the District Court for plaintiffs who are rehired from the date of the District Court's opinion to the date of rehiring;

3. The appeal in this action shall be ready for argument before this Court the week of April 25, 1977. Appellant's brief shall be submitted on April 12, 1977; appellee's brief shall be submitted on April 19, 1977; appellant's reply brief shall be submitted on April 22, 1977;

4. Defendants shall proceed expeditiously to process the information necessary to certify members of the plaintiff class incorporated in the District Court's Order of March 28, 1977. Defendants shall cooperate with counsel for plaintiffs in constructing relief in accordance with the District Court's Order of March 28, 1977. Defendants shall report to the Court in writing on April 7, 1977 the progress

of such processing and cooperation.

Dated: New York, New York
April 5, 1977

SO ORDERED:

Judge, United States Court of Appeals
J. Edward Lumbard

Judge, United States Court of Appeals
Walter R. Mansfield

Judge, United States Court of Appeals
Murray I. Gurfein

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- - - - - - - - - - - - - - - - - - - -x

THE GUARDIANS ASSOCIATION, et al.,

Plaintiffs,

-against-

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - - -x

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SARA E. STEINBOCK, being duly sworn deposes and says:

1. I am a member of the Bar of this Court and am one of the attorneys representing plaintiffs in this action. I am fully familiar with the facts and circumstances of this case. I submit this affidavit in opposition to the defendants' motion for a stay of the District Court's order pending the determination of the appeal from that order.

2. Defendants' motion for a stay is the most recent step in a long history of delays and obfuscation which has resulted in the denial of plaintiffs' rights for years. Contrary to defendants' assertion, the history of this litigation and of its predecessor, Guardians Association, et al. v. Civil Service Commission, et al., 72 Civ. 928 (Guardians I), speak eloquently for the fact that Judge Carter's order must not be stayed if plaintiffs are ever to recover from the discrimination they have been found to have suffered.

3. Guardians I was filed in March 1972 challenging, inter alia, the entry level examinations challenged herein. Although the District Court (Ryan, J.) assumed that plaintiffs had made a prima facie showing of discrimination, plaintiffs' motion for a preliminary injunction was denied on the ground that the existing lists were about to be exhausted.

4. Plaintiffs made an expedited appeal from Judge Ryan's decision. The Second Circuit affirmed the District Court's order on the ground that the lists from the examinations complained of were about to be exhausted and the action was therefore moot. Guardians Association v. Civil Service Commission, 490 F.2d 400, 404 (2d Cir. 1973).

5. Defendants were able to avoid a decision on the merits in Guardians I by delaying and failing to cooperate until the hirings of the Police Department made that action moot. In the instant case, defendants have continued to delay in the apparent hope that the action will again become moot.

6. On March 17, 1977 the District Court (Carter, J.) issued an opinion after lengthy evidentiary hearings holding that the hiring and layoff practices of the NYCPD violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and granting a preliminary injuction restraining the NYCPD from firing or recalling any police officers until seniority that they would have had but for defendants' discriminatory practices. That opinion is attached hereto as Exhibit A.

7. At the time Judge Carter issued his opinion all parties and the Court were aware that the NYCPD was scheduled to rehire approximately 250 police officers on March 31, and April 1. The Court then ordered expedited proceedings, as detailed below, in order that the plaintiff class be included in those hirings.

8. At a hearing on March 21, 1977, the District Court ordered the parties to cooperate in constructing relief consistent with the Court's order. It was defendants' position at that time -- and continues to be their position -- that no relief whatsoever should be granted. Defendants refused to submit any proposal for reordering the seniority lists.

9. At a hearing on March 23, 1977 the District Court ordered the parties to endeavor to gather the data necessary to provide relief to members of the plaintiff class. At that hearing, defendants contended that such data could not be developed before the hirings scheduled for March 31, 1977 and April 1, 1977. It was plaintiff's position that this information could be gathered and indeed must be gathered immediately to effectuate the District Court's opinion of March 17, 1977.

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Sara E. Steinbock

Sworn to before me this
30th day of March, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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THE GUARDIANS ASSOCIATION, et al.,

Plaintiffs,

-against-

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Defendants.

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ORDER

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WHEREAS, defendants having moved before this Court on March 30, 1977 for a stay of the District Court's Order of March 28, 1977 pending the determination of the appeal from that order; and

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of such processing and cooperation.

Dated: New York, New York
April , 1977

SO ORDERED:

_____
Judge, United States Court of Appeals

_____
Judge, United States Court of Appeals

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Judge, United States Court of Appeals